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# IRISH COMMON LAW REPORTS.

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## REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,  
EXCHEQUER,  
EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1852, 1853 AND 1854.

*Queen's Bench;*

By JOHN S. ARMSTRONG, Esq. AND W. H. FALON, Esq.

*Common Pleas;*

By HEWITT POOLE JELLET, Esq.  
AND LESLIE S. MONTGOMERY, Esq.

*Exchequer;*

By GRAVES CATHREW, Esq. AND J. P. HAMILTON, Esq.

*Exchequer Chamber;*

By JOHN S. ARMSTRONG, Esq.

*Court of Criminal Appeal;*

By JOHN S. ARMSTRONG, Esq. AND W. H. FALON, Esq.

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# JUDGES AND LAW OFFICERS

*During the period of these Reports.*

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## COURT OF QUEEN'S BENCH.

*Lord Chief Justice.*—The Right Hon. THOMAS LEFROY.

*Second Justice.*—The Hon. PHILIP CECIL CRAMPTON.

*Third Justice.*—The Right Hon. LOUIS PERRIN.

*Fourth Justice.*—The Right Hon. RICHARD MOORE.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Hon. JAMES HENRY MONAHAN.

*Second Justice.*—The Hon. ROBERT TORRENS.

*Third Justice.*—The Right Hon. NICHOLAS BALL.

*Fourth Justice.*—The Hon. JOSEPH DEVONSHIRE JACKSON.

## COURT OF EXCHEQUER.

*Lord Chief Baron.*—The Right Hon. DAVID RICHARD FIGOT.

*Second Baron.*—The Hon. RICHARD PENNEFATHER.

*Third Baron.*—The Right Hon. JOHN RICHARDS.

*Fourth Baron.*—The Right Hon. RICHARD WILSON GREENE.

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---

IN Hilary Term 1854, 28th January, LOFTUS HENRY BLAND, RICHARD ARMSTRONG and JOHN THOMAS BALL, Esquires, having been appointed of Her Majesty's Counsel, were sworn and admitted to the Inner Bar.

CORRIGENDA.

Page 17, line 22 from top, for "president" *read* "lessor."

„ 175, line 4 from bottom, *dele* "or rents."

„ 231, line 5 from bottom, for "forms" *read* "form."

Do. do. for "were" *read* "was."

„ 332, line 19 from top, for "repeats" *read* "repeals."

# A T A B L E

## OF THE

### NAMES OF THE CASES REPORTED.

N. B.—*v* (*versus*) always follows the Name of the Plaintiff.

Adair, White <i>v</i> ...	... 109	Burns <i>v</i> O'Leary ...	... 1
Allard <i>v</i> Ranagan ...	... 233	Butler <i>v</i> Devereux ...	... 108
Anderson <i>v</i> Fitzgerald ...	... 475	C	
Anonymous ...	... 119	Campbell, The Queen <i>v</i> ...	... 586
Anonymous, Cumming <i>v</i> ...	... 428	Campion, Spencer <i>v</i> ...	... 231
Anonymous <i>v</i> M'Donogh ...	... 584	Cannock, Cantwell <i>v</i> ...	... 78
Atkinson, Chadwick <i>v</i> ...	... 425	Cantwell <i>v</i> Cannock ...	... 78
Austin, The Queen <i>v</i> ...	... 441	Carr <i>v</i> Harpur ...	... 258
B		Cartwright <i>v</i> Ball ...	... 31
Ball, Cartwright <i>v</i> ...	... 31	Casey, In re ...	... 22
Bank of Ireland <i>v</i> Trustees of		Cavanagh, Reddick <i>v</i> ...	... 582
Evans' Charities ...	... 280	Chadwick <i>v</i> Atkinson ...	... 425
Barron <i>v</i> West of England In-		Church <i>v</i> Dalton ...	... 4
surance Co. ...	... 112	Clendenning <i>v</i> Browne ...	... 115
Blake, Kelly <i>v</i> ...	... 110	Coatesworth <i>v</i> Walsh ...	... 93
Bodkin <i>v</i> Leahy ...	... 36	Cock <i>v</i> Mahony ...	... 240
Boon's Case ...	... 189	Colhoun <i>v</i> Semple ...	... 114
Boyle <i>v</i> Hammond ...	... 579	Collins' Case ...	... 194
Brady's Case ...	... 187	Collins <i>v</i> De Montmorency ...	... 473
Brennan, In re ...	... 162	Concannon, Lally <i>v</i> ...	... 557
Brown, Fitzgerald <i>v</i> ...	... 253	Connolly <i>v</i> Dublin and Drogheda	
Browne, Clendenning <i>v</i> ...	... 115	Railway Company ...	... 255
Browne <i>v</i> Ellis ...	... 106	Coppinger <i>v</i> Synnott ...	... 563
Buckley <i>v</i> Devereux ...	... 107		

ii.

TABLE OF CASES REPORTED.

Coxe, Harrington v ...	87	Fitzgerald, Anderson v ...	475.
Crommelin v Marquis of Donegal	434	Fitzgerald v Brown ...	253
Cumming v ——— ...	428	Fleming v Taylor ...	75
D		Fottrell v Griffith ...	131
Dalton, Church v ...	4	Freeman, Fishbourne v ...	226
Dalziel v Walker ...	581	Frewen v Incorporated Society ...	118
D'Arcy, Davies v ...	617	G	
Davies v D'Arcy ...	617	Garde, Kennan v ...	20
De Montmorency, Collins v ...	473	Gill v Wilson ...	544
Denroche, Dickson v ...	241	Grady v Hunt ...	522
Devereux, Buckley v ...	107	Grant, Smith v ...	585
Devereux, Butler v ...	108	Great Western Railway Co., Scott v	466
Dickson v Denroche ...	241	Griffith, Fottrell v ...	131
Dickson, In re ...	101	H	
Disney v Hamilton ...	77	Hamilton, Disney v ...	77
Donegal, Marquis of, Crommelin v	434	Hammond, Boyle v ...	579
Donnery, Lessee Healy v ...	213	Harman, Shinner v ...	243
Dowell, O'Beirne v ...	119	Harpur, Carr v ...	258
Dowling v Sadlier ...	603	Harrington v Coxe ...	87
Dowling v Wallace ...	83	Harris v O'Meagher ..	129
Drainage Commissioners, Ex parte	140	Harrison v Lynch ...	256, 527
Dublin and Drogheda Railway Co.,		Healy, Lessee, v Donnery	213
Connolly v ...	255	Hewitt v Hewitt ...	222
Duffy, The Queen v ...	88	Hickey v Musgrave ...	446
E		Hodder v Kift ...	22
Eager, Rainsford v ...	120	Hood, Rutledge v ...	447
Edie v Phillips ...	77	Hornsby, Malley v ...	381
Ellis, Browne v ...	106	Hunt, Grady v ...	522
Evans's Charities, Trustees of,		Huston v Wallace ...	225
Bank of Ireland v ...	280	Hyland, Neville v ...	238
Evans, Stopford v ...	75	I	
Ex parte Drainage Commissioners	140	Incorporated Society, Frewen v ...	118
Eyre v Sparks ...	542	In re Brennan ...	162
F		In re Casey ...	22
Fishbourne v Freeman ...	226	In re Dickson ...	101
Fitton, Lenehan v ...	111	In re M'Nally ...	518, 576

TABLE OF CASES REPORTED.

iii.

<b>J</b>			<b>Malyn, Kinahan v ...</b>	<b>... 565</b>
<b>Jennings, Kirwan v ...</b>	<b>... 48</b>		<b>Mannix, Thomas v ...</b>	<b>... 128</b>
<b>Johnston v Midland Great Western</b>			<b>Midland Great Western Railway</b>	
<b>Railway Company</b>	<b>... 251</b>		<b>Company, Johnston v ...</b>	<b>251</b>
<b>Jones, Waldron v ...</b>	<b>... 34</b>		<b>Midland Great Western Railway</b>	
<b>K</b>			<b>Company, Scott v</b>	<b>59, 573</b>
<b>Kelly v Blake ...</b>	<b>... 110</b>		<b>Morgan v Potter ...</b>	<b>... 234</b>
<b>Kennan v Garde ...</b>	<b>... 20</b>		<b>Murphy v Toohey ...</b>	<b>... 226</b>
<b>Kift, Hodder v ...</b>	<b>... 22</b>		<b>Murphy's Case ...</b>	<b>... 203</b>
<b>Kinahan v Malyn ...</b>	<b>... 565</b>		<b>Musgrave, Hickey v ...</b>	<b>... 446</b>
<b>Kirwan v Jennings ...</b>	<b>... 48</b>		<b>N</b>	
<b>Kitchen, Russell v ...</b>	<b>... 613</b>		<b>Neile v Smith ...</b>	<b>... 76</b>
<b>L</b>			<b>Nelson, Russell v ...</b>	<b>... 229</b>
<b>Lally v Concannon ...</b>	<b>... 557</b>		<b>Nesbitt v M'Manus ...</b>	<b>... 600</b>
<b>Largan v Largan ...</b>	<b>... 117</b>		<b>Neville v Hyland ...</b>	<b>... 238</b>
<b>Lawler, The Queen v ...</b>	<b>... 507</b>		<b>O</b>	
<b>Leahy, Bodkin v ...</b>	<b>... 36</b>		<b>O'Beirne v Dowell ...</b>	<b>... 119</b>
<b>Lenahan v Fitton ...</b>	<b>... 111</b>		<b>O'Beirne, Stephens v ...</b>	<b>... 66</b>
<b>Londonderry and Coleraine Rail-</b>			<b>O'Brennan, The Queen v ...</b>	<b>... 589</b>
<b>way Company, M'Clintock v</b>	<b>609</b>		<b>O'Donnell v O'Donnell ...</b>	<b>... 29</b>
<b>Low, Taylor v ...</b>	<b>... 223</b>		<b>O'Leary, Burns v ...</b>	<b>... 1</b>
<b>Lowe, Wilcox v ...</b>	<b>... 470</b>		<b>O'Meagher, Harris v ...</b>	<b>... 129</b>
<b>Lynch, Harrison v ...</b>	<b>256, 527</b>		<b>P</b>	
<b>M</b>			<b>Phillips, Edie v ...</b>	<b>... 77</b>
<b>M'Cay v Magill ...</b>	<b>... 83</b>		<b>Poor-law Commissioners, The</b>	
<b>M'Clintock v Londonderry and</b>			<b>Queen v ...</b>	<b>... 147</b>
<b>Coleraine Railway Company</b>	<b>609</b>		<b>Potter, Morgan v ...</b>	<b>... 234</b>
<b>M'Donogh, ——— v ...</b>	<b>... 584</b>		<b>Powell v Price ...</b>	<b>... 232</b>
<b>M'Donogh v Macartney ...</b>	<b>... 239</b>		<b>Price, Powell v ...</b>	<b>... 232</b>
<b>M'Manus, Nesbitt v ...</b>	<b>... 600</b>		<b>Q</b>	
<b>M'Nally, In re ...</b>	<b>518, 576</b>		<b>Queen, The, v Austin ...</b>	<b>... 441</b>
<b>M'Niffe's Case ...</b>	<b>... 186</b>		<b>Queen, The, v Campbell ...</b>	<b>... 586</b>
<b>Macartney, M'Donogh v ...</b>	<b>... 239</b>		<b>Queen, The, v Duffy ...</b>	<b>... 88</b>
<b>Magill, M'Cay v ...</b>	<b>... 83</b>		<b>Queen, The v Lawlor ...</b>	<b>... 507</b>
<b>Mahony, Cock v ...</b>	<b>... 240</b>		<b>Queen, The, v O'Brennan ...</b>	<b>... 589</b>
<b>Malley v Hornsby ...</b>	<b>... 381</b>		<b>Queen, The, v Poor-law Commissrs.</b>	<b>147</b>



## TABLE OF CASES REPORTED.

Queen, The, v Redmond	... 494	Sparks, Eyre v	... 542
Queen, The v Wallace	... 38	Spencer v Champion	... 231
R		Spratt v Sherlock	... 69
Rainsford, Eager v	... 120	Stephens v O'Beirne	... 66
Ranagan, Allard v	... 233	Stopford v Evans	... 75
Reddick v Cavanagh	... 582	Swift v Swift	... 218
Redmond, The Queen v	... 494	Synnott, Coppinger v	... 563
Roche v Wilson	... 252	T	
Rodocanachi v Soderholm	... 531	Taylor, Fleming v	... 75
Roscommon Union, Rush v	... 14	Taylor v Low	... 223
Rush v Roscommon Union	... 14	Thomas v Mannix	... 128
Russell v Kitchen	... 613	Toohey, Murphy v	... 226
Russell v Nelson	... 229	V	
Rutledge v Hood	... 447	Vandeleur v Smith	... 86
Ryan's Case	... 191	W	
S		Waldron v Jones	... 34
Sadlier, Downing v	... 603	Walker, Dalziel v	... 581
Scott v Great Western Railway Co.	466	Wallace, Dowling v	... 83
Scott v The Midland Great Western		Wallace, Huston v	... 225
Railway Company	59, 573	Wallace, The Queen v	... 38
Semple, Colhoun v	... 114	Walsh, Coatesworth v	... 93
Sherlock, Spratt v	... 69	West of England Insurance Com-	
Shinner v Harman	... 243	pany, Barron v	... 112
Smith v Grant	... 585	White v Adair	... 109
Smith, Neile v	... 76	Wilcox v Lowe	... 470
Smith, Vandeleur v	... 86	Wilson, Gill v	... 544
Soderholm, Rodocanachi v	... 531	Wilson, Roche v	... 252

# A T A B L E

OF

## THE NAMES OF THE CASES CITED.

N. B.—*v* (*versus*) always follows the Name of the Plaintiff.

Abley <i>v</i> Dale	...	112	Balme <i>v</i> Hutton	...	549
Adamson <i>v</i> Jarvis	...	570	Bank of England, Coles <i>v</i>	303, 336,	
Akrill, Hawkins <i>v</i>	...	523		341, 342, 354, 378	
Alexander <i>v</i> Folville	115, 116, 431		Bank of England <i>v</i> Davis	...	303
Allen <i>v</i> Sharpe	...	458, 459	Bank of England, Davis <i>v</i>	303, 304,	
Anglesey, Earl of, The Tertenants				319, 336, 340, 341, 342, 352, 353,	
of, Suel <i>v</i>	...	136		358, 373, 378, 379	
Anonymous	...	219, 593, 596	Bank of England, De la Chaumette <i>v</i>	614	
Anonymous, Earl of Falmouth <i>v</i> ...	123		Bank of England, Sloman <i>v</i>	...	354
Anonymous, Molloy <i>v</i>	...	431	Bank of Ireland, Kelly <i>v</i>	...	303
Anthony <i>v</i> Rees	...	10	Barker <i>v</i> Greenwood	...	11
Arbour, Rutty <i>v</i>	...	67	Barker, Wilson <i>v</i>	...	570
Ashley, Barton <i>v</i>	...	207, 209, 210	Barrington, Lord, Searle <i>v</i>	...	376
Ashley <i>v</i> Fisher	...	614	Barron <i>v</i> The West of England		
Ashmole <i>v</i> Wainwright	...	573	Insurance Company	...	256
Ashton, Taylor <i>v</i>	...	570	Barter, Rex <i>v</i>	...	155
Aston, The, Union Case	...	442	Barton <i>v</i> Ashley	...	207, 209, 210
Atherton, Jones <i>v</i>	...	52	Barton <i>v</i> Seymour	...	2, 3
Attorney-General <i>v</i> Hartley	...	136	Bass, The King <i>v</i>	...	597
Attorney-General, The, <i>v</i> The Cor-			Bateman <i>v</i> Dunn	...	537
poration of London	...	118	Bayley <i>v</i> The Overseers of Nant-		
Atty <i>v</i> Parish	...	611	wich	...	211
Austin <i>v</i> The Manchester and Lin-			Beasley <i>v</i> Tyrrell	...	118
colnshire Railway Company...	573		Bedford Level, Rex <i>v</i>	...	155
Austin, Swete <i>v</i>	...	3	Beed <i>v</i> Blandford	...	125
Bagot, Lord, Williams <i>v</i>	...	593	Begbie <i>v</i> Clark	311, 331, 332, 371	
Bains, In re	...	163	Beglin's (Edward) Case	...	211
Baker, Galway <i>v</i>	334, 335, 345, 371		Belk <i>v</i> Broadbent	...	515
Ball, Rex <i>v</i>	...	497	Bell <i>v</i> Nangle	...	11
Ballinrobe Union, The Guardians			Bennett <i>v</i> Firkins	...	553
of, Lynch <i>v</i>	...	17	Bennett, Doe d. Guest <i>v</i>	...	11

Bennett v Hamilton ...	455	Braybroke v Inskipp...	11
Bensley v Burdon ...	618	Braythwayte v Hitchcock ...	9
Bentley v Northouse...	614	Bridgman, Kane v ...	2
Bentley, Walker v ...	453	Brien v Brien ...	2
Berrey v Lindley ...	601	Brindley v Hemans ...	542, 543
Best, Tilby v ...	88	Bristol Dock Co., The Queen v ...	155
Biddell v Dowse ...	611	Bristol and Exeter Railway Co., Parker v ...	593
Bingham, Doe d. Mannion v 70, 71, 73		Britain v Kinnaird ...	458
Binstead, White v ...	549	Broadbent, Belk v ...	515
Birch and another, Rigley v ...	88	Brooke v Bookett ...	123
Birch v Somerville ...	592	Brooke, Rex v ...	594
Bird v Randall ...	341, 353	Brown v Gracy ...	616
Birmingham, The Churchwardens of, v Shaw ...	17	Brown v Harrenden ...	614
Birmingham, The Rector & Church- wardens of, The King v ...	155, 157	Brown v Higgs ...	215
Birnie, Goslin v ...	63	Brown, Hutchins v ...	212
Bishop v Helps ...	212	Brown v Pocock ...	215
Bishop, Regina v ...	514	Brown, Vansandan v...	564
Blackburne v Kymer ...	469	Brown, Williams v ...	151
Blake, The Queen v ...	600	Bryant, Laythorpe v...	122
Blanford, Reed v ...	125	Buchanan, Hill v ...	426
Blewitt, Hunt v ...	118	Bucknall, Cox v ...	526
Bliss v Woods ...	151	Bulkeley, Talbot v ...	536
Bloomfield, Lord, Daly v ...	71	Buller, Carpenter v ...	618
Bolton, The Queen v ...	459	Burdon, Bensley v ...	618
Bonny, The King v ...	25	Burgess v Clements ...	357
Bonsor v Element ...	218, 219, 220	Burness v Guiranovich ...	535
Bookett, Brooke v ...	123	Burton, Woodward v...	470
Boon v Moffatt ...	191	Busby, Patterson v ...	232
Booth v Moffatt ...	191	Butler, Lee v ...	220
Borradaile v Hunter ...	476	Butt v Jackson ...	538
Boulton v Crowther ...	403	Byfield v Street ...	67
Bowen v Evans ...	455	Byrne, Lessee Walker v ...	8
Boweren, Grymes v ...	248	Byrne v Walsh ...	524
Boyn, Nichols v ...	67	Cahill, Wall v ...	52
Braddyll, Duck v ...	547, 549	Cairnes, Haynington, Executor, v ...	135
Bradley v Waterhouse ...	355	Callinan, Lysaght v ...	601
Bradshaw, Sheriffs of Norwich v...	612	Calye's Case ...	356
Braintree Union, The Queen v ...	153	Campion, Spencer v ...	542, 543
Braithwaite, Rex v ...	594	Capel's Case ...	630, 643, 654
Brassington, Vance and another, Executors of Falls, v ...	135	Carew, Lloyd v ...	618
		Carpenter v Buller ...	618
		Carr v Hinchliffe ...	98

## TABLE OF CASES CITED.

vii.

Carr v Marsh	...	155	Connell, Graham v	...	523
Carr, Shaw v	...	614	Constable, Newton v	...	116
Carr v The Lancashire and York-			Cooke, Oates v	...	10
shire Railway Company	...	573	Cookson, Forster v	...	547
Carter, Pordage v	...	231, 542	Cooper, Massiter v	...	573
Carter, Skey v	...	550	Coppin v Craig	...	98
Cartwright v Rowley	...	573	Coppin, Jackson v	...	63
Casterton v Sutherland	...	215	Corporation of London, The Attor-		
Caunce v Spanton	...	63	ney-General v	...	118
Cavanagh v Collett	...	430, 432	Corrigan v M'Gower	...	21
Chambers v Coleman	...	52, 129	Corry v Wharton	...	604
Chambers, Hutchins v	...	18	Costelloe, Gildea v	...	467
Chambers, Pepper v	...	85	Costelloe's Case	...	155
Chapman v Townner	...	9	Cotton v Sawyer	...	252
Charlton, Mayor of Ludlow v	...	610	Cowper v Goold	...	426
Cheesman v Exall	...	573	Cox v Bucknall	...	526
Chester, Bishop of, Farnsworth v	...	151	Cox v Tullock	...	232
Chippendale, v The Lancaster and			Craig, Coppin v	...	98
Yorkshire Railway Company	...	573	Craig, Shaw v	...	231, 542
Cholmondely's Case	...	630, 643, 654	Crampton v Morris	...	124
Church v Imperial Gas-Light Co.	...	610	Creevey, The King v	...	45
Clagett, George v	...	98	Croft, Nicholson v	...	530
Clark, Begbie v	...	311, 331, 332, 371	Crosbie, Evans v	...	11
Clark, Machil v	...	618, 629, 630	Crosbie v Sugrue	...	71
Clarke v Dignam	...	53	Crossling v Crossling	...	214
Clements, Burgess v	...	357	Crowder, Lovick v	...	52, 129
Close v Phipps	...	573	Crowther, Boulton v	...	403
Clothier v Ess	...	592	Cullen v Sharkett	...	136
Coates, Nash v	...	215	Cully, In re	...	25, 26
Cocker v Musgrove	...	550	Culling v Tunell	...	247
Cocking v Ward	...	122, 123, 125	Cuming, Toms v	...	186, 190
Codd, Stratton v	...	88	Curtis v Richards	...	122
Cole, Eccles v	...	67	Da Costa v Newenham	...	536
Coleman, Chambers v	...	52, 129	Dale, Abley v	...	112
Coles v Bank of England	...	303, 336, 341,	Dalton, M'Nevin v	...	135
	...	342, 354, 378	Dalton, Rex v	...	26, 27
Collett, Cavenagh v	...	430, 432	Daly v Lord Bloomfield	...	71
Collins v Evans	...	570	Dalziel v Walker	...	585
Collinson v Newcastle and Darling-			Darley v Kinahan	...	442
ton Railway Company	...	404	Darley v The Queen	...	157, 442
Coltman, Davenport v	...	11	Davenport v Coltman	...	11
Commissioners of Police, Lawless v	...	594	Davenport v Tyrrell	...	326, 369
Commissioners of Public Works v			Daveron, Day v	...	11
Ryan	...	236	Davis, Meredith v	...	377

Davis, Pike v ...	523	Dowse, Biddell v ...	611
Davis v The Bank of England, 303, 304, 319, 340, 341, 342, 352, 373, 378, 379		Dredge, The Queen v	502, 503
Davis, Wollett v ...	207	Drewe v Lainson ...	52, 55, 56
Dawes, De Feucheres v ...	538	Duck v Braddyll ...	547, 549
Daws, In the matter of ...	26	Duckett v Williams ...	476
Day v Dameron ...	11	Duffy, The Queen v ...	90
Day v King ...	587	Dunn, Bateman v ...	537
Dean and Chapter of Windsor v		Dunne, The Queen v	593, 598
Gover ...	611	Dwyer, Lessee Walker v	526
De Beavior v Owen ...	71	Earl, Rowson v ...	564
De Feucheres v Dawes ...	538	Eastern Counties Railway Co., The Queen v ...	403
De La Chaumette v The Bank of England ...	614	Eastwood, Hellewell v	249
Delegal v Highly ...	580	Eccles v Cole ...	67
Dignam, Clarke v ...	53	Edgar v Sorrell ...	612
Dilly v Polhill ...	611	Edge v Wandesforde ...	219
Dimsdale, Woodroofe v ...	232	Edsworth, Farrer v ...	207
Dobbinson, Philpot v ...	228	Edwards v Robertson ...	104
Doe v Johnson ...	601	Edwards v Rogers ...	681
Doe v Jones ...	618	Element, Bonsor v ...	218, 219, 220
Doe v Oliver ...	618	Ellis, Grant v ...	71, 72
Doe v Samuel ...	601	Ellis, Scadding v ...	123
Doe v Watts ...	601	Ellison, Sartees v ...	237
Doe d. Beezley v Woodhouse ...	10	Elwes v Mawe ...	246, 247, 250
Doe d. Gilbert v Ross ...	604	Ess, Clothier v ...	592
Doe d. Gillard v Gillard ...	11	Evans, Bowen v ...	455
Doe d. Gregory v Whichelo ...	618	Evans, Collins v ...	570
Doe d. Guest v Bennett ...	11	Evans v Crosbie ...	11
Doe d. Hickman v Haslewood ...	11	Ewer, Walpole v ...	535
Doe d. Hollingsworth v Stennett ...	8	Exall, Cheesman v ...	573
Doe d. Mannion v Bingham 70, 71, 73		Exeter, Bishop of, Gully v	377
Doe d. Neville v Rivers 618, 633		Ex parte Fitzgibbon ...	519
Doe d. Rees v Williams ...	10	Ex parte Grady ...	518, 519
Doe d. Tofield v Tofield ...	11	Ex parte Harvey ...	153
Doherty, The King v ...	593	Ex parte Higgins ...	102
Donegal, Marquis of, v Lord Tem- plemore ...	220	Ex parte Humphrys ...	593
Douglas v Holme ...	122	Ex parte Inge ...	155
Dowling, Rex v ...	444	Ex parte Kinning ...	104
Dowling v Wallace ...	280	Ex parte Plummer ...	550
Downes v Garbutt ...	67	Falmouth, Earl of, v ———	123
		Farnsworth v The Bishop of Ches- ter ...	151
		Farrer v Edsworth ...	207



## TABLE OF CASES CITED.

ix.

Ferguson v Livingston and wife ...	134	Grace, Wood v ...	530
Ferrand, Garnett v ...	27	Gracy, Brown v ...	616
Fielden, The Kilkenney and Great Southern and Western Railway Co. v ...	523	Grady, Ex parte ..	518, 519
Firkins, Bennett v ...	553	Graham v Connell ...	523
Fish v Kempton ...	98	Graham v Sandrinelli ...	536
Fisher, Ashley v ...	614	Grand Junction Railway Co., Pickford v ..	573
Fleming v Taylor ...	242	Grant v Ellis ...	71, 72
Folville, Alexander v ...	115, 116, 431	Gratitudine, Case of the ...	535
Ford v Smedley ...	163, 184	Gratrex, Prichett v ...	598
Forde v Tweedy ...	168	Graves v Murray ...	269
Forster v Cookson ...	547	Gray's Case ...	312, 313, 346
Foster v Hornsby ...	401	Greene, Whitmore v ...	548
Fox v The Overseers of Shaston ...	163	Greenwood, Barker v ...	11
Fraser v Shaw ...	580	Gregg, Kennedy v ...	280, 295, 366, 352, 368
French v French ...	124	Grogan v Lee ...	526
Furnell, M'Gauran v ...	538	Grote, Young v ...	358, 364, 355
Gadsen v M'Lean ...	536	Grymes v Boweren ...	248
Galway v Baker ...	334, 335, 345, 371	Guiranicovich, Burness v ...	535
Garbutt, Downes v ...	67	Gully v The Bishop of Exeter ...	377
Garnett v Ferrand ...	27	Guthrie v Sterne ...	334
Geach v Ingall ...	476	Hall, Pantou v ...	134, 136, 137, 139
George v Clagett ...	98	Hamerton v Stead ...	9
Gethin v Wilks ...	548	Hamilton, Bennett v ...	455
Gibbons v Spalding ...	523, 536	Hanning, Trent v ...	10
Gildea v Costelloe ...	467	Hardacre v Nash ...	11
Gillard, Doe d. Gillard v ...	11	Harding v Glyn ...	215
Gilsworthy v Norman ...	84	Hardy, Magrath v ...	457
Glascok, Took v ...	618	Harrenden, Brown v ...	614
Glengall, Lord, Prendergast v ...	129	Harridge, Hodsden v ...	611
Glynn, Harding v ...	215	Harris v Osborne ...	564
Godolphin, Duke of Marlborough v ...	215	Harris, Rex v ...	606
Goodright v Mead ...	618	Harris v Watson ...	63
Goodright v Mead and Shilson ...	634	Harter, Trappes v ...	248
Godson v Sanctuary ...	550	Hartley, Attorney-General v ...	136
Goodtitle v Morse ...	631	Hartley, Rossett v ...	523
Goold, Cowper v ...	426	Harvey, Ex parte ...	153
Gordon v Murphy ...	118	Harvey, The King v ...	44, 46
Goslin v Birnie ...	63	Haslewood, Doe d. Hickman v ...	11
Goss v Lord Nugent ...	63, 64, 122	Hathersal, Rex v ...	25, 27
Gover, The Dean and Chapter of Windsor v ...	611	Hawkes, Thomas v ...	124
		Hawkins v Akrill ...	523

x.

TABLE OF CASES CITED.

Hayden, O'Shaughnessy v	... 467	Humphrys v Pratt	... 570, 571
Hayden, Power v	... 467	Hunt v Blewitt	... 118
Haylock v Sparke	... 594, 598	Hunt v Hooper	... 51, 55, 58
Haynington, Executor, v Cairnes	135	Hunter, Borradaile v	... 476
Hedges, West v	... 549	Hutchins v Chambers	... 18
Henchett v Kimpson	550, 551	Huthwaite, In re	... 471
Hellawell v Eastwood	... 249	Hutton, Balme v	... 549
Helps, Bishop v	... 212	Imperial Gas-Light Company,	
Hemans, Brindley v	542, 543	Church v	... 610
Hetherington, Roddam v	... 538	Ingall, Geach v	... 476
Heywood v Smith	... 629	Inge, Ex parte	... 155
Higgins, Ex parte	... 102	Inhabitants of Great Bentley, The	
Higgs, Brown v	... 215	King v	... 163
Highly, Delegal v	... 580	Inhabitants of Ramsgate, The	
Hill v Buchanan	... 426	King v	... 163
Hill, Mason v	... 405	In re Bains	... 163
Hill v Montague	... 583	In re Culley	... 25, 26
Hillcoat, Moysey v	... 151	In re Daws	... 26
Hinchliffe, Carr v	... 98	In re Huthwaite	... 471
Hinds, Rawson v	... 2, 3	In re Lyons	... 519
Hinton v Stevens	... 232	In re Nolan	... 91
Hislop, Pegler v	... 536	In re Robbins' Estate	559, 561, 562, 563
Hitchcock, Braythwayte v	... 9	In re Symes	... 518
Hitchins v Brown	... 212	Inskipp, Braybroke v	... 11
Hockley v Mawbey	... 214	Isaac, Pringle v	... 53, 54, 55
Hodsden v Harridge	... 611	Jack, d. M'Guirk, v Reilly	... 11
Hodson, Mallalien v	... 583	Jackson, Butt v	... 538
Hogan v Jackson	... 215	Jackson v Coppin	... 63
Holloway v Holloway	... 215	Jackson, Hogan v	... 215
Holme, Douglas v	... 122	Jackson v Rogers	... 573
Holmes v Newlands	... 2	Jarvis, Adamson v	... 570
Hooper, Hunt v	51, 55, 58	Jefferson v Morton and others	... 134
Hope, d. Brown v Taylor	... 11	Johnson, Doe v	... 601
Hopkins, King v	... 67	Jones v Atherton	... 52
Hopper v Smith	... 219	Jones, Doe v	... 618
Hornsby, Foster v	... 401	Jordan, Roe d., v Ward	... 601
Hornsby, Sharpley v	396, 398, 401, 404, 407, 408, 415, 418, 419, 420	Justices of Middlesex, The Queen v	153
Hornsby, Stubber v	... 401	Justices, The Visiting, of Middlesex Asylum, The Queen v	153
Howard v Shaw	311, 331, 332, 371	Justices of West Riding of Yorkshire, Rex v	... 587
Howard, Wright v	... 405	Kane v Bridgman	... 2
Howden, Rogers v	... 538	Kean v Stronge	... 330
Humphrys, Ex parte	... 593		

## TABLE OF CASES CITED.

xi.

Keating, Marsh v ...	379	Kinning, Ex parte ...	104
Keily, Smith v ...	470	Kirwan's Case ...	89, 92
Keith, Trebec v ...	152	Kymer, Blackburne v ...	469
Kelly v The Bank of Ireland ...	303	Lainson, Drewe v ...	52, 55, 56
Kemmis, Lord Trimleston v ...	295, 309, 335, 345, 371, 372	Lancashire and Yorkshire Railway Company, Carr v ...	573
Kempland v M'Cauley ...	53, 55, 58	Lancaster and Yorkshire Railway Company, Chippendale v ...	573
Kempton, Fish v ...	98	Langston v Wetherell ...	604, 605
Kennedy v Gregg ...	280, 295, 306, 352, 368	Lanyon, Taylor v ...	550
Kilkenny and Great Southern and Western Railway Company v Fieldin ...	523	Larchin v Willan ...	537
Killala, Bishop of, Lessee Desmu- nea v ...	296	Lavey v The Queen ...	515, 517
Kimpson, Henchett v ...	550, 551	Lawless v The Commissioners of Police ...	594
Kinahan, Darley v ...	442	Lawless, The Queen v ...	599
Kinahan, Rex v ...	155	Lawrence, Trevivan v ...	457
King, Day v ...	587	Laythorpe v Bryant ...	122
King v Hopkins ...	67	Lee v Butler ...	220
King, The, v Bass ...	597	Lee, Grogan v ...	526
King, The, v Bonny ...	25	Lee v Lopes ...	548, 549, 552, 557
King, The, v Creevey ...	45	Lees v Moseley ...	215
King, The, v Doherty ...	593	Lessee Desmunea v The Bishop of Killala ...	296
King, The, v Harvey ...	44, 46	Lessee Macartney v Magrath ...	604
King, The, v Kinnear ...	41, 42	Lessee Parke v M'Loughlin ...	71
King, The, v Inhabitants of Great Bentley ...	163	Lessee Walker v Byrne ...	8
King, The, v Inhabitants of Rams- gate ...	163	Levy v Regina ...	517
King, The, Lynam v ...	296	Lewis v Newton ...	67
King, The, v Mayor and Aldermen of London ...	152	Lidwell, Walters v ...	2
King, The, v Poor-law Commis- sioners ...	152	Lindley, Berrey v ...	601
King, The, v Rector and Church- wardens of Birmingham ...	155, 157	Litthbridge v Wigton ...	439
King, The, v Rose ...	26	Livingston and Wife, Ferguson v ...	134
King, The v Stanlake ...	26, 27	Lloyd v Carew ...	618
King, The, v Symmers v ...	326, 369	Lloyd v Lloyd ...	618
King, The, v Woodfall ...	44	Longfield and others, M'Sweeny v ...	134
Kinnaird, Britain v ...	458	Lopes, Lee v ...	548, 549, 552, 557
Kinnear, The King v ...	41, 42	Lord Lucan's Case ...	15, 16, 17, 18, 19
		Lord Mohun's Case ...	26
		Lord, Whitehead v ...	564
		Loveday's Case ...	376
		Lovick v Crowder ...	52, 129
		Low, Taylor v ...	543
		Lymberry, Mason v ...	215

Lynam v The King ...	... 296	Mason v Hill ...	... 405
Lynch v The Guardians of the		Mason v Lymberry ...	... 215
Ballinrobe Union ...	17	Massiter v Cooper ...	... 573
Lynch, Witham v ...	... 523	Maton, Wansborough v ...	... 247
Lyon, Petch v ...	... 124	Mawbey, Hockley v ...	... 214
Lyons, In re ...	... 519	Mawe, Elwes v ...	246, 247, 250
Lysaght v Callinan ...	... 601	Mayor and Aldermen of London,	
M'Alpine v Mangnall in error ...	480	The King v ...	... 152
M'Cauley, Kempland v ...	53, 65, 58	Mayor of London, Regina v ...	594
M'Causland, Martin v ...	470	Mayor of Ludlow v Charlton ...	610
M'Clatchie, Patterson v ...	470	Mayor of Oxford, Rex v ...	155
M'Dermott, O'Connor v ...	470	Mead, Goodright v ...	618
M'Gauran v Furnell ...	538	Mead and Shilson, Goodright v ...	634
M'Gower, Corrigan v ...	21	Mealing, Watkin v ...	67
M'Hugh, Martin v ..	241	Meeke v Oxlade ...	530
M'Kay, Warner v ....	98	Meredith v Davis ...	377
M'Kenzie, Rex v ...	593	Meyrick, Stilk v ...	63
M'Lean, Gadsen v ...	536	Mills, Thurston v ...	52, 53, 56, 57
M'Loughlin, Lessee Parke v ...	71	Molloy v ——— ...	115
M'Loughlin v Pryor ...	570	Montague, Hill v. ...	583
M'Nevin v Dalton ...	135	Moreley, Rex v ...	597
M'Sweeny v Longfield and others	134	Moriarty v Wilson ...	134
Macartney, Lessee, v Magrath ...	604	Moreland, Swain v ...	53, 57
Machil v Clark ...	618, 629, 630	Morria, Crampton v ...	124
Maddox, Seymour v ...	232	Morse, Goodtitle v ...	631
Magrath v Hardy ...	457	Mortimer, Stephenson v ...	98
Magrath, Lessee Macartney v ...	604	Morton and others, Jefferson v ...	134
Magrath, Rex v ...	27	Moseley, Lees v ...	215
Mallalien v Hodson ...	583	Mothersell, Smith v ...	430
Mallett, The Queen v ...	26	Moysey v Hillcoat ...	151
Manchester and Leeds Railway		Murphy, Gordon v ...	118
Co., The Queen v ...	593	Murray, Graves v ...	269
Manchester and Lincolnshire Rail-		Murray, Rowe v ...	2
Co., Austin v ...	573	Musgrove, Cocker v ...	550
Mangnall in error, M'Alpine v ...	480	Nangle, Bell v ...	11
Marlborough, Duke of, v Godolphin	215	Nash v Coates ...	215
Marsh, Carr v ...	155	Nash, Hardacre v ...	11
Marsh v Keating ...	379	Naylor, Wharton v ...	547
Marshall v Pitman ...	17	Newbon, Wakefield v ...	573
Martin v M'Causland ...	470	Newcastle and Darlington Railway	
Martin v M'Hugh ...	241	Co., Collinson v ...	404
Martin Regina v ...	516	Newenham, Da Costa v ...	536
Martin v Roe ...	234	Newlands, Holmes v ...	2

## TABLE OF CASES CITED.

xiii.

Newton v Constable ...	... 116	Phipps, Close v ...	... 573
Newton, Lewis v ...	... 67	Pickford v Grand Junction Railway	
Nicholls v Wilson ...	... 564	Company ...	... 573
Nichols v Boyn ...	... 67	Pike v Davis ...	... 523
Nicholson v Croft ...	... 530	Pitman, Marshall v ...	... 17
Norman, Gilsworthy v ...	... 84	Plummer, Ex parte ...	... 550
Northouse, Bentley v ...	... 614	Plummer v Wildman ...	... 536
Northwich Savings Bank, The		Pocock, Brown v ...	... 215
Queen v ...	... 153	Polhill, Dilly v ...	... 611
Nowlan, In re ...	... 90	Poor-law Commissioners, Regina v	150
Nugent, Lord, Goss v ...	63, 64, 122	Poor-law Commissioners, The	
Oates v Cooke ...	... 10	King v ...	... 152
O'Connell, The Queen v ...	... 90	Pordage v Carter ...	231, 542
O'Connor v M'Dermott ...	... 470	Porter, Payne v ...	... 580
Oldfield, Ripley v ...	... 26	Powell, Price v ...	252, 253
Oliver, Doe v ...	... 618	Power v Hayden ...	... 467
Osborne, Harris v ...	... 564	Power v Whitmore ...	... 536
O'Shaughnessy v Hayden ...	... 467	Powlett, Parteriche v ...	... 122
Otley, Rex v ...	... 247	Pratt, Humphrys v ...	570, 571
Overseers of Nantwich, Bayley v	211	Prendergast v Lord Glengall ...	129
Overseers of Shaston, Fox v ...	... 163	Price v Powell ...	252, 253
Overton, Regina v ...	514, 515, 516, 517	Prichard v Sears ...	... 322
Owen, De Beavoir v ...	... 71	Prichett v Gratrex ...	... 593
Oxlade, Meeke v ...	... 530	Pringle v Isaac ...	53, 54, 56
Palmer, Strobe v ...	... 376	Pryor, M'Loughlin v ...	... 570
Panton v Hall ...	134, 136, 137, 139	Queen, The, v Blake ...	... 600
Parish, Atty v ...	... 611	Queen, The, v Bolton ...	... 459
Parker v Bristol and Exeter Rail-		Queen, The, Darley v ...	157, 442
way Company ...	... 593	Queen, The, v Dredge ...	502, 503
Parker, Rex v ...	... 25	Queen, The, v Duffy ...	... 90
Parteriche v Powlett ...	... 122	Queen, The, v Dunne ...	593, 598
Patterson v Busby ...	... 232	Queen, The, v Eastern Counties	
Patterson v M'Clatchie ...	... 470	Railway Company ...	... 403
Pawson v Watson ...	... 476	Queen, The, Lavey v ...	515, 517
Payne v Porter ...	... 580	Queen, The, v Lawless ...	... 599
Peckham, Willis v ...	... 573	Queen, The, v Mallett ...	... 26
Pegler v Hislop ...	... 536	Queen, The, v Manchester and	
Pemberton, Peto v ...	... 612	Leeds Railway Company ...	593
Pepper v Chambers ...	... 85	Queen, The, v O'Connell ...	... 90
Perkins, Wansey v ...	... 212	Queen, The, v O'Doherty ...	... 91
Petch v Lyon ...	... 124	Queen, The, Ryalls v ...	... 514
Peto v Pemberton ...	... 612	Queen, The, v The Braintree Union	152
Phelps v Smith ...	... 339	Queen, The, v The Bristol Dock Co.	155
Philpot v Dobbins ...	... 228	Queen, The, v Justices of Middlesex	152



Queen, The, v The Northwich Savings Bank ...	153	Rex v Tregarthen ...	597
Queen, The, v The Visiting Justices of Middlesex Asylum ...	153	Reynolds v Tresham ...	430
Rabone v Williams ...	98	Richards, Curtis v ...	122
Radnor, Earl of, v Reeve ...	458	Rigley and another v Birch ...	88
Ramsden, Rex v ...	443	Ripley v Oldfield ...	26
Randall, Bird v ...	341, 353	Rivers, Doe d. Neville v ...	618, 633
Rawson v Hinds ...	2, 3	Robertson, Edwards v ...	104
Re Beloved Wilkes' Charity ...	155	Robins' Estate, In re 559, 561, 562, 563	
Rector and Churchwardens of Birmingham, The King v ...	155	Robinson, Roper v ...	35
Rees, Anthony v ...	10	Robinson, Whitmore v ...	550
Reeve, The Earl of Radnor v ...	458	Roddam v Hetherington ...	538
Regina v Bishop ...	514	Roe d. Jordan v Ward ...	601
Regina v Dunn ...	593	Roe, Martin v ...	234
Regina v Levy ...	517	Rogers, Edwards v ...	631
Regina v Martin ...	516	Rogers, Howden v ...	538
Regina v Mayor of London ...	594	Rogers, Jackson v ...	573
Regina v Overton 514, 515, 516, 517		Roper v Robinson ...	35
Regina v St. Martin's in the Fields 442		Rose, The King v ...	26
Regina v Poor-law Commissioners 150		Ross, Doe d. Gilbert v ...	604
Reilly, Jack d., M'Guirk v ...	11	Ross v Sandell ...	252
Rex v Ball ...	497	Rosset v Hartley ...	523
Rex v Barker ...	155	Rowe v Murray ...	2
Rex v Bedford Level ...	155	Rowland v Veale ...	513
Rex v Braithwaite ...	594	Rowley, Cartwright v ...	573
Rex v Brooke ...	594	Rowson v Earl ...	564
Rex v Dalton ...	26, 27	Rudyard's Case ...	596
Rex v Dowling ...	444	Rutty v Arbour ...	67
Rex v Harris ...	606	Ryalls v The Queen ...	514
Rex v Hathersal ...	25, 27	Ryan, Commissioners of Public Works v ...	236
Rex v Kinahan ...	155	Samuel, Doe v ...	601
Rex v M'Kenzie ...	593	Sanctuary, Godson v ...	550
Rex v Magrath ...	27	Sandell, Ross v ...	252
Rex v Moreley ...	597	Sandrinelli, Graham v ...	536
Rex v Otley ...	247	Sarteas v Ellison ...	237
Rex v Parker ...	25	Saumarez v Saumarez ...	11
Rex v Ramsden ...	443	Sawyer, Cotton v ...	252
Rex v Stukeley ...	25	Scadding v Ellis ...	123
Rex v The Justices of the West Riding of Yorkshire ...	587	Scanlan v Sceales ...	476
Rex v The Mayor of Oxford ...	155	Sceales, Scanlan v ...	476
Rex v Treble ...	497	Searle v Lord Barrington ...	376
		Sears, Prichard v ...	322
		Seymour, Barton v ..	2, 3
		Seymour v Maddox ...	232

TABLE OF CASES CITED.

xv.

Seymour's Case ...	630	Storton's Case ...	594
Sharkett, Cullen v ...	136	Stratton v Codd ...	88
Sharpe, Allen v ...	458, 459	Street, Byfield v ...	67
Sharp v Warren ...	404	Strode v Palmer ...	376
Sharpley v Hornsby ...	396, 398, 401, 404, 407, 408, 415, 418, 419, 420	Strong, Kean v ...	330
Shaw, Carr v ...	614	Stubber v Hornsby ...	401
Shaw v Craig ...	231, 542	Stubber v Trench ...	269, 270
Shaw, Fraser v ...	530	Stukely, Rex v ...	25
Shaw, Howard v ...	311, 331, 332, 371	Suel v Tertenants of the Earl of Anglesey ...	136
Shaw, The Churchwardens of Bir- mingham v ...	17	Sugrue, Crosbie v ...	71
Shaw, Waggett v ...	36	Sutherland, Casterton v ...	216
Sheffield and Rotheran Railway Company, Turner v ...	408	Swain v Morland ...	53, 57
Sheriffs of Norwich v Bradshaw ...	612	Swete v Austin ...	3
Shipton v Thornton ...	535	Syme's Case ...	519
Simonds v White ...	536	Symes, In re ...	518
Sir N. Storton's case ...	594	Symmers v The King ...	326, 369
Skey v Carter ...	550	Talbot v Bulkeley ...	536
Sloman v The Bank of England ...	354	Taylor v Ashton ...	570
Smedley, Ford v ...	163, 184	Taylor, Fleming v ...	242
Smith, Heywood v ...	629	Taylor, Hope d. Brown v ...	11
Smith, Hopper v ...	219	Taylor v Lanyon ...	550
Smith v Keily ...	470	Taylor v Low ...	543
Smith v Motherwell ...	430	Taylor v Taylor ...	550
Smith, Phelps v ...	339	Taylor v Webb ...	10
Smith's Case ...	25	Templemore, Lord, The Marquis of Donegal v ...	220
Somerville, Birch v ...	592	Thomas v Hawkes ...	124
Sorrell, Edgar v ...	612	Thornton, Shipton v ...	535
Spalding, Gibbons v ...	523, 536	Throckmerton v Tracy ...	612
Spanton, Caunce v ...	63	Thurston v Mills ...	52, 53, 56, 57
Sparke, Haylock v ...	594, 598	Tilby v Best ...	88
Spencer v Champion ...	542, 543	Tofield, Doe d. Tofield v ...	11
Stanlake, The King v ...	26, 27	Toms v Cuming ...	186, 190
Stapleton v Stapleton ...	618	Took v Glascock ...	618
Stead, Hamerton v ...	9	Tottenham's Case ...	207
Stennett, Doe d. Hollingsworth v ...	8	Towner, Chapman v ...	9
Stephenson v Mortimer ...	98	Tracy, Throckmerton ...	612
Sterne, Guthrie v ...	334	Trappes v Harter ...	248
Stevens, Hinton v ...	232	Trebec v Keith ...	152
Stewart, Vans Agnew v ...	453	Treble, Rex v ...	497
Stilk v Meyrick ...	63	Tregarthen, Rex v ...	597
St. Martin's in the Fields, Regina v ...	442	Trench, Stubber v ...	269, 270
		Trent v Hanning ...	10

Tresham, Reynolds v	... 430	Webb, Taylor v	... 10
Trimbey v Vignier	... 615	Weir v Weir	242, 256
Trimblestown, Lord, v Kemmis	295, 309, 335, 345, 371, 372	West v Hedges	... 549
Trevivan v Lawrence	... 457	West of England Insurance Co., Barron v	... 256
Tulloch, Cox v	... 232	Wetherell, Langston v	604, 605
Tunell, Culling v	... 247	Wharton, Corry v	... 604
Turner v Sheffield and Rotheran Railway Co.	... 403	Wharton v Naylor	... 547
Tweady, Forde v	... 163	Whichelo, Doe d. Gregory v	... 618
Tyrrell, Beasley v	... 118	White v Binstead	... 549
Tyrrell, Davenport v	326, 369	White, Simonds v	... 536
Vance and another, executors of Falls, v Brassington	... 135	Whitehead v Lord	... 564
Vans Agnew v Stewart	... 453	Whitmore v Greene	... 548
Vansandan v Brown	... 564	Whitmore, Power v	... 536
Veale, Rowland v	... 515	Whitmore v Robinson	... 550
Vignier, Trimbey v	... 615	Wigton, Litthbridge v	... 439
Waggett v Shaw	... 36	Wilcox, Williams v	... 73
Wainwright, Ashmole v	... 573	Wildman, Plummer v	... 536
Wakefield v Newbon	... 573	Wiles v Woodward	... 618
Walker v Bentley	... 453	Wilkes' Case	... 593
Walker, Lessee, v Byrne	... 8	Wilks, Gethin v	... 548
Walker, Dalziel v	... 585	Willan, Larchin v	... 537
Walker, Lessee, v Dwyer	... 526	Williams v Brown	... 151
Wall v Cahill	... 52	Williams, Doe d. Rees v	... 10
Wallace, Dowling v	... 230	Williams, Duckett v	... 476
Walpole v Ewer	... 535	Williams v Lord Bagot	... 593
Walsh, Byrne v	... 524	Williams, Rabone v	... 98
Walters v Lidwell	... 2	Williams v Wilcox	... 73
Wandesford, Edge v	... 219	Willis v Peckham	... 573
Wansborough v Maton	... 247	Wilson v Barker	... 570
Wansey v Perkins	... 212	Wilson, Moriarty v	... 134
Ward, Cocking v	122, 123, 125	Wilson, Nicholls v	... 564
Ward, Roe d. Jordan v	... 601	Witham v Lynch	... 523
Warmoll v Young	... 52	Wollett v Davis	... 207
Warner v M'Kay	... 98	Wood v Grace	... 530
Warren, Sharp v	... 404	Woodfall, The King v	... 44
Warwick Gas-light Co., Tilson v	611	Woodhouse, Doe d. Beezley v	... 10
Waterhouse, Bradley v	... 355	Woodroffe v Dimsdale	... 232
Watkin v Mealing	... 67	Woods, Bliss v	... 151
Watson, Harris v	... 63	Woodward v Burton	... 470
Watson, Pawson v	... 476	Woodward, Wiles v	... 618
Watts, Doe v	... 601	Wright v Howard	... 405
		Young v Grote	358, 364, 365
		Young, Warmoll v	... 52

COMMON LAW REPORTS,  
OF CASES ARGUED AND DETERMINED IN  
THE COURTS OF  
QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,  
Exchequer Chamber  
AND  
COURT OF CRIMINAL APPEAL.

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BURNS v. O'LEARY.\*

(*Queen's Bench.*)

M. T. 1852.  
*Queen's Bench*  
Nov. 4.

SCIRE FACIAS, on a judgment of Easter Term 1850, recovered by the plaintiff against the defendant on a plea of confession, for the sum of £120 and costs. The writ was in the ordinary form, praying execution against the defendant for the debt and damages, according to the form of the recovery.

To the *scire facias*, the defendant pleaded that, after the rendition and recovery of the said judgment, and whilst the said judgment was in full force, and before the commencement of this action, the said plaintiff, for obtaining satisfaction of and upon said judgment, and of the said debt, sued and prosecuted out of the said Court a *capias ad satisfaciendum* against the said defendant, directed to the

To a *scire facias* on a judgment, praying execution generally, the defendant pleaded that a *ca. sa.* had been issued by the plaintiff on foot of the judgment in the *sci. fa.* mentioned, under which the defendant had been arrested; and then averred that the de-

fendant was released and discharged from this arrest by consent of the plaintiff, and from the execution upon said judgment.—*Held*, that such a plea was bad on general demurrer.

*Held also*, that, admitting the facts stated in the plea to be true, the *sci. fa.* need not pray a special execution excluding personal arrest.

*Semble*.—The voluntary discharge of a debtor, in custody under a *ca. sa.* issued on foot of a judgment, does not deprive the creditor of his right to issue another execution under the statute 35 G. 3, c. 30.

\* PERRIN, J., *absente*.

M. T. 1852. Sheriff of the county of Cork ; by which writ the Sheriff was com-  
*Queen's Bench*  
 BURNS  
 v.  
 O'LEARY. manded that he should take the said defendant, and her safely keep,  
 &c.: by virtue of which said writ, the Sheriff afterwards, and before  
 the return thereof, and before the commencement of this action,  
 arrested the said defendant for the cause therein specified. That  
 whilst the said defendant was still in arrest and execution under  
 said writ of *capias ad satisfaciendum*, she was, with the consent,  
 privity and license of the said plaintiff, released and discharged  
 from the said arrest, and from said execution at the suit of the  
 said plaintiff of and upon the said judgment. *Verification.*

General demurrer and joinder.

*J. W. Sherlock* and *J. Clarke*, in support of the demurrer.

The question raised here is, whether a plaintiff, having issued  
 execution against the person of the defendant, is entitled to have  
 execution for the same debt against the lands and goods of the  
 defendant. This depends upon the construction to be put upon  
 the 35 G. 3, c. 30, s. 31 (*Ir.*). That section enacts "that every  
 "person who shall have charged or detained his or her debtor, on  
 "a *capias ad satisfaciendum* or otherwise, shall have the same exe-  
 "cution for the same debt against the lands or goods or other estate  
 "of his or her said debtor, by *elegit*, *feri facias*, or otherwise, as  
 "if the said creditor had not so imprisoned, or charged, or detained  
 "his or her said creditor in prison ; any law, practice or usage to  
 "the contrary notwithstanding." By virtue of that provision the  
 plaintiff was entitled to execution against the person and against  
 the goods. In *Brien v. Brien* (a), it was decided that under that  
 section a *feri facias* sued out against the goods of the debtor in  
 confinement under a *ca. sa.* upon the same judgment is not irre-  
 gular, but that the defendant is entitled to apply to the Court for  
 his discharge. *Rowe v. Murray* (b); *Barton v. Seymour* (c); *Holmes*  
*v. Newlands* (d); *Kane v. Bridgman* (e); *Walters v. Lidwell* (f).  
 No special *scire facias* was necessary in this case: *Rawson v. Hinds*.

(a) 1 H. & Br. 300, n.

(c) 1 H. & Br. 304, n.

(e) 5 Ir. Law Rep. 222.

(b) 1 H. & Br. 296.

(d) 5 Q. B. 367.

(f) 9 Ir. Law Rep. 362.

*Sullivan*, contra.

The construction sought to be put on the statute is not the true one. Here, by the voluntary discharge of the debtor, the debt is discharged, and the statute is only applicable to 'the case' of a creditor obstinately remaining in prison, and thereby defeating the rights of his creditors: and that such was the intention of the statute appears from a temporary Act, subsequently passed, 41 G. 3, c. 64, which provided that it should be lawful for a creditor, by writing, to signify and declare his consent to the discharge of the debtor, without losing the benefit of the judgment on which the execution issued. In *Swete v. Austin* (a), it was held that statute was applicable to Ireland.—[LEFROY, C. J. It may have been a declaratory Act as to Ireland, and enacting as to England.]—I only refer to it to show that the construction sought to be put upon the previous Act is not so clear as has been contended for.

But the real question turns upon the form of the pleading. The *scire facias* ought to have been a special one, or there should have been a special replication to the plea. Every averment must be taken most strongly against the pleader; and as on such a *scire facias* only one execution can issue, that must be considered the execution under the *ca. sa.*, and cannot be intended to include an execution under a *fi. fa.* The practice has been always to issue a special *scire facias*. In *Barton v. Seymour*, and *Swete v. Austin*, the *scire facias* was special. But assuming a special writ not to be necessary, he ought to have replied specially, as in *Rawson v. Hinds*.—[MOORE, J. Your plea is defective, in confining the execution to the *ca. sa.*, and in saying the plaintiff should not have any execution.—LEFROY, C. J. The *scire facias* is in the usual form, and must include every species of execution.—CRAMPTON, J. Your difficulty seems to be that you do not answer the entire charge contained in the *scire facias*. Your answer is, that under the *ca. sa.* the execution is discharged; but that admits that the judgment is still in force, and admits the plaintiff's right to execution by a *fi. fa.*—The plea avers the suing out the *ca. sa.*, and

M. T. 1852.  
Queen's Bench  
BURNS  
v.  
O'LEARY.

(a) 1 H. & Br. 308, n.

M. T. 1852. *Queen's Bench* that he acted under it; therefore the plaintiff could never have another execution of that kind.

*BURNS*  
v.

*O'LEARY.*

The 3 & 4 *Vic.*, c. 105, s. 25, debars the judgment creditor who has arrested his debtor under a *ca. sa.* from the remedies given thereby against the debtor's real estate; and this is an additional reason why the prayer of execution in the *sci. fa.* should be special, and not general.

*Clarke*, in reply, was not called on.

*Per Curiam.*

There is no ground for contending that this *scire facias* should be special. The plea is bad, and the demurrer must be allowed.

MICHL. CHURCH, ROBT. RUSKELL, and ANNE his Wife,  
v.

MARTHA DALTON, Executrix of ROBERT DALTON.

Nov. 9.

A lessee for lives renewable, after the expiration of the last of the three *cestui que vies*, and before any renewal was obtained, made a lease of the premises to B. A afterwards took a renewal, which was granted in consideration of all rent due out of the premises.—*Held*, that at the time of making the lease to B, A was tenant at will to the owner.

A had, under the will of her husband, acquired the estate of which the renewal was obtained; by which will, after bequests of several legacies and annuities, which were not payable until a year after A's death, the testator appointed her sole executrix, and gave her power and control over all his real and personal estate—to raise money by mortgage or letting, if necessary for protection of his estate; and also empowered her, by deed or will, to appoint one or more person or persons to carry out the trusts of his will. A obtained a renewal of the premises in June 1835; and in 1841 she made her will, and appointed the plaintiffs executors and executrix of her will, and also her residuary legatees, and nominated and appointed them trustees to carry out the intention of the will of her late husband.

*Held*—That under A's will the reversion of the said premises passed to the plaintiffs.

(a) 2 Ir. Com. Law Rep. 249.

The case was tried before LEFROY, C. J., at the Sittings after Trinity Term 1852, when the jury found a special verdict. M. T. 1852.  
*Queen's Bench*

The verdict found one Philip Crampton being seised in his demesne as of fee in the premises in the declaration mentioned. By an indenture of renewal of the 14th of March 1788, made between the said Philip Crampton of the one part, and Edward Hodson of the other part, reciting an original lease of October 1751, for three lives, and the death of one of the lives, and the several renewals—it was witnessed that Philip Crampton, for the considerations therein expressed, granted the premises therein described to Edward Hodson, for three lives therein named. That by a deed of conveyance of the 15th of February 1809, Edward Hodson assigned to one Richard Magee the said premises; and that by deed of conveyance, by way of assignment, Magee conveyed to one Thomas Dawson, who, by lease of the 19th of September 1812, granted and sold to Robert Dalton certain premises therein described, for the same lives as in the deed of 1788: this lease contained a covenant by Thomas Dawson to renew, and the premises were the same as in the declaration mentioned, and a portion of those granted by the several renewals.

CHURCH  
v.  
DALTON.

The verdict then found that Thomas Dawson made his will, which was set out; but the only parts material were as follow:—  
 “I give, leave, devise and bequeath all and singular the real,  
 “freehold and personal estate and property of which I shall die  
 “possessed or entitled, unto my wife Anne Dawson, during her  
 “natural life. I leave, devise and bequeath the several following  
 “legacies—after the death of my said wife—to Anne Ruskell, the  
 “wife of Robert Ruskell, &c., the sum of £40 yearly during her  
 “natural life, to be paid and payable to her quarterly, on her own  
 “receipt or acquittance alone, without the control of her husband,  
 “and that the same shall not be subject to his debts, &c.; and  
 “after her decease, to her son Clement and her daughter Jemima,  
 “the said sum of £40 yearly, share and share alike; and in  
 “case of the death of the said Clement or Jemima without issue,  
 “then the share of him or her so dying to the survivors, and;  
 “to be received by them, or the survivor of them, in the same  
 “manner as their mother enjoyed the same; and in the event



M. T. 1852. "of the said Clement or Jemima dying without issue, my will is  
*Queen's Bench* "that the said yearly sum of £40 so bequeathed to the said Anne  
 CHURCH "Ruskell, and to the said Clement and Jemima her children, be  
 v. "divided amongst the other legatees named in this will, rateably,  
 DALTON. "according to their and each of their respective legacies—to Robert  
 "Ruskell of, &c., £10 sterling, and to Michael Church of, &c., the  
 "sum of £22. 15s. 0d., to be paid quarterly during his natural life,  
 "and after his decease to his issue," &c. Several other bequests were  
 given by said will, and it thus concluded:—"And my will is, that  
 "the several legacies and bequests hereinbefore mentioned shall not  
 "be demanded or be payable for one year after the death of my  
 "said wife, whom I appoint sole executrix of this my will; and that  
 "after my decease, she shall have full power and control over all  
 "my real and personal freehold estate and property, as I shall die  
 "seised of, possessed, or entitled unto; and my will is, that in case  
 "my said wife shall have occasion to raise any sums for the protec-  
 "tion of any of my real or freehold property, or any part thereof,  
 "that then, and in that case, I hereby empower her so to do, by  
 "mortgaging or letting any part thereof, as she shall think fit;  
 "and my will is, that all the rest, residue and remainder of my  
 "property, real, freehold and personal, after the death of my said  
 "wife, to go to and amongst, and be divided between, the said  
 "several legatees hereinbefore named, rateably, according to their  
 "and each of their respective bequests and legacies hereinbefore  
 "mentioned: and I hereby empower and authorise my said wife  
 "Anne Dawson, by any deed or testament in writing, or under  
 "her hand and seal, or by her last will and testament, to name,  
 "constitute and appoint any one person, or any two persons, to  
 "carry the trusts of my will into execution."

The verdict further found that Thomas Dawson died in May .  
 1828, and that on his death, Anne Dawson entered into the receipts  
 and profits of the lands, and that the surviving life in the said  
 recited indenture died on the 31st of December 1833. That by  
 indenture, bearing date 22nd of February 1834, Anne Dawson, as  
 devisee and executrix of Thomas Dawson, granted to Robert  
 Dalton, and his heirs and assigns, the tenements granted and

released by the indenture of 19th of September 1812 (being the premises in the declaration mentioned)—*Habendum* for three lives therein named, and the survivor, with covenant of renewal, at the yearly rent of £42.

M. T. 1852.  
*Queen's Bench*  
CHURCH  
v.  
DALTON.

That by indenture of renewal of the 24th of June 1835, reciting the several renewals of these premises, and that the estate of the several assignees had vested in Thomas Dawson, and reciting his death, it was witnessed that Philip Crampton, for the considerations therein, granted and confirmed unto Anne Dawson, and her heirs and assigns, the premises and hereditaments—*Habendum* for three lives, and the survivor of them, at a rent of £33. 4s. 7d., payable half-yearly; and it was found that at the time of and before the execution of said last renewal, all the said yearly rent, and arrears of rent, had been paid by Anne Dawson to Philip Crampton.

The verdict further found that Robert Dalton died in September 1838, having appointed Martha Dalton, his wife, executrix of his will, and Christopher Duff and Robert Kane executors. That such will was proved on the 22nd of September 1838. It then found that Anne Dawson made her will, bearing date the 21st of March 1841, duly attested, which was set out, one recital in which was, "Whereas, I am possessed of certain moneys in Government securities and otherwise;" and after sundry bequests, the will thus concluded:—"And I hereby appoint the said Michael Church and "the said Anne Ruskell executor and executrix of this my will, "and I also appoint them, the said Anne Ruskell and Michael "Church, my residuary legatees; and I also nominate and appoint "them trustees, to carry the intentions of the will of my late "husband Thomas Dawson, deceased, into execution." Anne Dawson died on the 30th of November 1841, leaving Michael Church and Anne Ruskell her surviving.

It was further found that Robert Dalton duly paid all rent which accrued due in his lifetime out of the premises granted by the indentures of the 19th of September 1812 and 22nd of February 1834, and that Martha Dalton, as his executrix, paid all rent due during the lifetime of Anne Dawson, out of the premises, from the death of

M. T. 1852.  
*Queen's Bench*  
 CHURCH  
 v.  
 DALTON.

Robert Dalton; and had also paid to Michael Church and Anne Ruskell the rent which accrued due from Anne Dawson's death to the 25th of March 1846. It was also found that no part of the rent, by the indenture of the 22nd of February 1834 made payable out of the premises therein, had been paid since the 25th of March 1846; it also found that Martha Dalton had assets in her hands sufficient to cover the damages alleged in the declaration to have been sustained. The jury found damages contingently—amount, £210. But whether or not Anne Dawson was possessed of the said premises as tenant at will to Philip Crampton, the jurors are ignorant, &c.; and whether or not Philip Crampton granted and released the premises to Anne Dawson, *modo et formâ*, and whether or not Anne Dawson devised the reversion of the premises to Michael Church and Anne Ruskell, and whether or not any part of the rent was in arrear, *modo et formâ*, and whether or not she was seised of the reversion, *modo et formâ*, and if the plaintiffs had a right to maintain the action?

*Harrison, Ball and Joy*, for the plaintiffs.

The first question here is, whether Anne Dawson was tenant at will to Philip Crampton at the date of the lease on which we are suing?—and secondly, whether the reversion expectant on the determination of that lease passed by Anne Dawson's will to the plaintiffs?

Anne Dawson held under Philip Crampton, for lives renewable for ever, and the last life in the lease died on the 31st of December 1833. No renewal of her lease was taken out until June 1835; but the lease to Dalton on which the present action is brought is dated the 21st of February 1834: at that time we contend Anne Dawson was tenant at will to the head landlord: *Lessee Walker v. Byrne* (a); *Doe d. Hollingsworth v. Stennett* (b). In 1 *Fur. Land. & Ten.*, p. 244, it is said:—"Leases for lives, with covenants of renewal for ever, confer a legal estate for the lives of the persons named as *cestui que vies*, and of the survivor of them, accompanied by an equitable agreement binding the reversioner, on the performance

(a) 3 Law Rec., N. S., 68.

(b) 2 Esp. 716.

"of certain stipulations, to grant new leases from time to time for ever, on the decease of the original and substituted *cestui que vies* respectively. If all the *cestui que vies* die, and no renewal be executed, the lessee becomes at law merely tenant at will." In *Hamerton v. Stead* (a), Littledale, J., observes:—"It is unnecessary to say whether the instrument in question is or is not a lease—for where parties enter under a mere agreement for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for—that being the primary contract. But if no rent is paid, still, before the execution of a lease, the relation of landlord and tenant exists—the parties having entered with a view to a lease, and not a purchase." So in *Chapman v. Towner* (b), where a memorandum of agreement was executed, by which the plaintiff was to let to the defendant, and defendant to take a house from June next ensuing, for a term of twenty-one years, determinable at seven and fourteen years; that the lease was to contain a covenant on part of the defendant to purchase the fee-simple for £600 within seven years of the term, and a covenant to pay the rent, and for re-payment of insurance money, with the usual covenants in leases of houses; and that defendant should execute a counterpart of the lease when tendered: it was held that this was an agreement for a lease, and not an actual demise; and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which could only be determined by a notice to quit, or a surrender in writing. Parke, B., in p. 104, observes:—"When the defendant entered he was only tenant at will until he paid rent, and he then became tenant from year to year." And in *Braythwaite v. Hitchcock* (c), it is said:—"Although the law is clearly settled that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pay rent under that agreement, he thereby becomes tenant from year to year."

M. T. 1852.  
Queen's Bench  
CHURCH  
v.  
DALTON.

(a) 3 B. & C. 483.

(b) 6 M. & W. 100.

(c) 10 M. & W. 497.

M. T. 1852. From the expiration of the lease for lives, in December 1833, to the execution of the lease of the 22nd of February 1834, no payment of rent was made by Anne Dawson to her landlord, nor did any rent become due: so her interest was but that of a tenant at will; and if so, the Court has decided that by her executing that lease for the term, she determined the tenancy at will (2 *Com. Law Rep.*, p. 249).

*Queen's Bench*  
CHURCH  
v.  
DALTON.

On the second question—whether the reversion expectant on the lease of 1834 is vested in the plaintiffs—we contend that, under the last clause of Anne Dawson's will, whereby she nominated and appointed the plaintiffs trustees to carry the intentions of the will of her husband into execution, she conferred upon them the legal estate in those properties which were clothed with the trusts of her husband's will, following, as she did, the very terms of his will, and thus incorporating it in her own: and further, that by the words, "I also appoint them my residuary legatees," coupled with the entire provisions of the will, as showing an intention not to die intestate in regard to any of her property (whether beneficial or fiduciary), she devised to them the reversion expectant on the lease of 1834. The plaintiffs are the proper parties to sue here, as is apparent from the will of Thomas Dawson, which bears date in 1827. Anne Dawson made her will in 1841, following the very words used by Thomas Dawson; and she appoints the plaintiffs her trustees and executors, as also her residuary legatees, to carry the trusts of her husband's will into execution: they therefore should take the legal estate, without which they could not execute the trusts: *Doe d. Rees v. Williams* (a). The question whether the legal estate passes by the words of a will is always one of intention, manifest from the entire instrument, and no technical words are necessary if that intention be apparent. The mere appointment of a person to carry out a trust, without devising the lands to him, is carried out in cases decided on implication arising from the will: *Taylor v. Webb* (b); *Trent v. Hanning* (c); *Oates v. Cooke* (d); *Doe d. Beezley v. Woodhouse* (e); *Anthony v. Rees* (f); *Doe d.*

(a) 2 M. & W. 749.

(c) 7 East, 97.

(e) 4 T. R. 89.

(b) Styles, 301.

(d) 3 Bur. 1685.

(f) 2 Cr. & Jer. 75.

*Hickman v. Haslewood* (a); *Doe d. Gillard v. Gillard* (b); *Barker v. Greenwood* (c). In all these cases the trustees took the legal estate: *Doe d. Guest v. Bennett* (d).

M. T. 1852.  
Queen's Bench  
CHURCH  
v.  
DALTON.

But secondly, we contend that under the words of that residuary devise, Anne Dawson devised the reversion to the trustees: *Braybroke v. Inskipp* (e). Do the words "residuary legatee" pass real estate? *Hope d. Brown v. Taylor* (f). The word "legacies" extends to lands as well as to moneys: *Hardacre v. Nash* (g); and real property may pass under the description of personal estate: *Doe d. Tofield v. Tofield* (h); *Saumarez v. Saumarez* (i).—[LEFROY, C. J. The words 'legacy or legatee' will carry the estate, if that be the intention of the the testator, so that the question depends on the will itself.]—In *Evans v. Crosbie* (k), the Vice Chancellor says:—"It seems to me that the cases of *Day v. Dameron*, and "*Davenport v. Coltman*, have a value with regard to this case in "this respect, that they are authorities as to the use of the word "'legatee,' as applicable, in the minds of the parties who used it, "to a disposition of real estate." The word in the will, "trustees," clothes them with the legal estate.

*Macdonogh and Meagher*, contra.

The legal power cannot continue, once the legal estate to which it is incident is determined, for when an estate is gone at law, all powers over it are also gone. The estate which Anne Dawson took under her husband's will expired in December 1834: *Bell v. Nangle* (l); *Jack d. M'Guirk v. Reilly* (m); and no renewal was obtained by her from Crampton until June 1835. There is here no identity of the two estates; and the power conferred by the will of Thomas Dawson was referrible to a totally different estate from that of Anne Dawson; for, it was to the estate that passed by his

(a) 6 Ad. & El. 167.

(c) 4 M. & W. 421.

(e) 8 Ves. jun. 416.

(g) 5 T. R. 716.

(i) 4 Myl. & Cr. 331.

(l) 2 J. & S. 642.

(b) 5 B. & Ald. 785.

(d) 20 L. J., N. S., Exch. 323.

(f) 1 Bur. 269.

(h) 11 East, 246.

(k) 15 Sim. 602.

(m) 2 H. & B. 305, 306.

M. T. 1852.

*Queen's Bench*

CHURCH

v.

DALTON.

will, and which was determined when she executed the power.—  
 [MOORE, J. May the devise not mean that Anne Dawson devised to her trustees all that she took under the will of Thomas Dawson as a trustee?—LEFROY, C. J. If a person having a power and interest does an act importing to be in pursuance of that power and interest, will not the matter be referred to either the power or interest to effect the object?—But we say Anne Dawson took an estate as tenant from year to year, and the tendency of Courts is to presume in favour of yearly tenancies.—[LEFROY, C. J. Suppose she were a yearly tenant, would not the new lease operate by enlargement?—In *Wigram on Extrinsic Evidence*, pp. 15 and 17, the rules are laid down that “A testator is presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.” Again:—“Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words, so interpreted, are sensible, with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.”

Anne Dawson's will must intimate her intention, and nothing outside the will can be brought in aid; she represents it as personal estate she was possessed of, by the recital in her will, and the Court must construe that clause of her will as a residuary devise; and as far as that goes, it is impossible to say an estate passed, sufficient to maintain this action. The declaration sets out that Anne Dawson was tenant at will of the demised premises to Philip Crampton, who was seised in fee; and that being so possessed, and the reversion thereon expectant so belonging, she, on the 21st of

February 1834, bargained and sold the premises, and afterwards, to wit, on the 22nd of February 1834, released them to Robert Dalton—*Habendum* for three lives; then that Philip Crampton, on the 23rd day of June 1835, bargained and sold, and on the 24th of June, released the same to Anne Dawson, her heirs and assigns, for an estate of freehold, for the lives of certain persons in being (one of whom was different from the lives in the preceding lease), *virtute cuius* Anne Dawson became and was seised of the estate of freehold of and in the reversion expectant on the term previously granted; and being so seised, she devised the reversion to the plaintiffs, &c. She was tenant from year to year when she made this lease to Dalton; for it appears on the special verdict that, on the 31st of December 1833, her title from Crampton ended and determined, and then, on the 22nd of February 1834, before any payment of rent, she made the lease the subject of this action. In 1835, she obtained the renewal, and before that, all the rent that accrued due in the interval between December 1833 and that period had been paid, and thus was established a tenancy from year to year, during the entire period that the rent was paid.—[MOORE, J. All that may be evidence, but by no means conclusive.]—It would be evidence that an agreement was entered into.—[MOORE, J. We are arguing on a special verdict, and can infer nothing. Suppose, after payment of that rent in 1835, Anne Dawson had served a notice to quit, and said she had a right to do so, could she then say she was tenant from year to year by relation back?]  
—2 *Smith*, L. C. p. 74.

M. T. 1852.  
*Queen's Bench*  
CHURCH  
v.  
DALTON.

*Ball*, in reply, was not called on.

LEFROY, C. J.

In this case it is unnecessary to occupy time with our judgment; the sole inquiry is, what estate Anne Dawson had at the time she made the lease in question? not what estate she subsequently acquired. It is plain she was tenant at will when the lease was executed. Then as to the operation of the bequests, it would defeat the primary intention of Anne Dawson's will if we did not hold that



M. T. 1852.  
*Queen's Bench*

CHURCH  
v.

DALTON.

it passed an estate to the trustees, for there is on it a plain purpose of appointing trustees to carry out the trusts of her husband's will; and the execution of those trusts required a legal estate to be in the trustees. She has used language amply sufficient to carry out those several trusts specified in that will. The special verdict must be found for the plaintiffs.

Judgment for the plaintiffs.

RUSH, in replevin,

v.

THE GUARDIANS OF THE POOR  
OF THE ROSCOMMON UNION and THOMAS CONRY.

Nov. 12, 15.

Two Poor-law rates were made on certain premises on the 21st of December 1847, and 21st of December 1848; the rated premises were under £4 per annum value, and one M. was rated as immediate lessor, but no person was named as occupier in the rate book. When the rates were made, A. held the premises under a lease from M., made before 6 & 7 Vic., c. 92, he being then the immediate lessor; but before the levy of the rate A. had ceased to occupy the premises, and the plaintiff in 1850 became the occupier as yearly tenant to M. The rates not being paid by M. within four months after the making of them, the plaintiff was required to pay them as occupier, and he having refused, the premises were distrained. *Held*, such distress was legal, because the person liable to the rate cannot set up an error in the rate book as a defence to a distress for the rate, the rate being a valid rate.

This was a special case, stated for the opinion of this Court, by consent.

The action was one of replevin, brought by the plaintiff against the Guardians of the Roscommon Union, for taking his goods and chattels as a distress for poor-rate. The defendants avowed, and made cognizance for this distress—to which avowry and cognizance the plaintiff pleaded three pleas, and on these pleadings the following case was submitted:—

The defendant Thomas Conry was the collector of poor-rates for the Guardians of the Roscommon Union; and the rates, in respect of which the distress was levied, were made respectively on the 21st of December 1847, and the 21st of June 1848. The premises rated

*Semble*.—The proper course would have been an appeal against the rate.

averaged from £2 to £4, and one Marcus M'Causland was rated as the immediate lessor, and no person was named as occupier in the rate book. At the time the rates were made, one Mary M'Govern held the premises under a lease made before the passing of 6 & 7 Vic., c. 92 (1843)—Marcus M'Causland being then her immediate lessor, and Mary M'Govern had ceased to occupy, before the levy of the rate. The plaintiff, on the 27th of March 1850, became the occupier of the premises, as tenant from year to year to Marcus M'Causland; and on the 4th of June 1851, notices were served on the plaintiff by the defendants, calling on him, as occupier, to pay the rates within one month from the date of the notices—same not having been paid within four months after the making of such rates on the immediate lessor. The rates not having been paid, the Guardians issued their warrant to Thomas Conry, authorising him to collect them, and under that warrant he distrained on the lands so formerly occupied by Mary M'Govern, on the 28th of July 1851. The question submitted to the Court was, whether or not the said distress was maintainable?

M. T. 1852.  
*Queen's Bench*  
 RUSH  
 v.  
 ROSCOMMON  
 UNION.

If the Court should be of opinion in the affirmative, by consent, a judgment of *nolle prosequi* was to be entered against the plaintiff; and if the Court should be of a contrary opinion, defendants agreed that judgment should be entered against them by confession.

*Meagher* (with him *Thomas O'Hagan*), for the defendants.

This rate was not void, and the case is not governed by *Lord Lucan's case* (a). The rate was imposed on the immediate lessor by name, and the lease under which the premises were held was made previous to the passing of the late Act, which made immediate lessors liable for the rate. In any action brought against M'Causland, seeking to make him liable to the rate as immediate lessor, it would be open to him to show he was not the immediate lessor; but an error in misnaming a person as immediate lessor does not render the whole rate void, so as to make a distress illegal. The 1 & 2 Vic., c. 56, s. 61, provides that the Guardians shall make and levy such rates as "may be necessary, on every occupier of rateable heredi-

(a) 13 Ir. Law Rep. 44.

M. T. 1852. *Queen's Bench*  
**RUSH**  
**v.**  
**ROSCOMMON**  
**UNION.**

taments;" and the 62nd section enacts that in making such rate, "regard shall be had to the amount which shall in manner "aforesaid have been ascertained to be chargeable upon any electoral division in respect of its proportion of the expenses incurred "in the relief of persons within the workhouse of the union during "the period to which the last account of such expenses shall "extend." And the 63rd section defines what hereditaments are rateable under the Act. These sections are conversant with the making of the rates, and the amount necessary to be raised for the current period. The 64th section directs the rates to be made on "an estimate of the net annual value of the several hereditaments rated thereunto." The 65th section prescribes the mode in which the rates are to be made. But the whole of the sections regard the premises as being always liable to the rate; and if mistakes do occur in naming the occupier, they will not exonerate the premises, though they may enable the complainant to dispute his liability. The sections giving the right of distress are the 73rd and 78th. The 73rd gives to the collector the same powers as are given by the 6 & 7 Vic., c. 92, s. 3, to county cess collectors; and the 78th authorises the Guardians, in case the rate be not paid within two months after its being made, to raise such rate by distress on the rateable property. —[PERRIN, J. The question is, whether the rate in this case be a rate at all?—If the Court come to the conclusion that the Guardians acted without any jurisdiction, the complainant has a right to try that by action; but if the Guardians had some jurisdiction, then clearly a right of appeal exists.—[PERRIN, J. But the rate is not made on the occupier; who then is to appeal?—Any one aggrieved; s. 156; and s. 110 enacts—"That notwithstanding any "such appeal, or notice thereof, every rate shall be payable, and "shall be levied, as if no appeal had been made, until such rate "shall be actually quashed or amended." It must be argued that the rate is wholly void; and if void now, it must have been void when it was imposed. This case differs from *Lord Lucan's case*: for there the Guardians acted without a shadow of jurisdiction—in this case they had clearly some jurisdiction.

In *The Churchwardens of Birmingham v. Shaw* (a), it was held, that a person exempt from poor-rate, as occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy made to enforce such rate not appealed against. In *Lynch v. The Guardians of the Ballinrobe Union* (b), it was held, that the name of a person appearing on the rate books of a union as immediate lessor is not conclusive evidence of that fact, and may be rebutted: so in *Marshall v. Pitman* (c), it was held, that where a party having no stock in trade is rated as an inhabitant, his remedy is by appeal to the Quarter Sessions, and replevin does not lie for a distress under such a rate.

M. T. 1852.  
Queen's Bench  
RUSH  
v.  
ROSCOMMON  
UNION.

*J. Robinson and Martley, contra.*

This distress cannot be maintained. The two rates were made on Marcus M'Causland, the immediate lessor: one on the 21st of June 1847, the other on the 21st of June 1848,—both made under the subsequent Poor-law Act, 6 & 7 Vic., c. 92, s. 1. M'Causland was not the immediate lessor, for a person named M'Govern held the premises under a lease. The Guardians thus assumed jurisdiction, and if so, their act is void, and the remarks of the Court in that case from 10 Q. B. exactly apply.—[LEFROY, C. J. The rate there was made on the occupier, not on the president.—CRAMPTON. The entry in the rate book is only *prima facie* evidence, not conclusive; and that is all the Court decided in *Lord Lucan's case*.]—But we have the evidence here stated that M'Causland was not the immediate lessor.—[MOORE, J. But this is not an action against M'Causland.]—The jurisdiction given by the Act is that where a person holds under a lease not exceeding £4 rent, the immediate lessor is to be rated instead of the occupier, and him alone. The Guardians, having made that rate on the lessor, cannot now recover it from the subsequent occupier. The 1 & 2 Vic., c. 56, imposed a rate on the occupier, giving him a specific liability. The 6 & 7 Vic., c. 92, substituted a new liability; by that, if a lease be made after

(a) 10 Q. B. 868.

(b) 3 Ir. Jur. 254.

(c) 9 Bing. 595; S. C. 2 M. & S. 745.

M. T. 1852. the Act of Parliament passed, the rate was on the immediate lessor;  
*Queen's Bench* here the lease was made before the 6 & 7 Vic., c. 92, and so no  
*RUSH* liability attached to the lessor.—[MOORE, J. *Lord Lucan's case*  
*v.* decided that if an action be brought against the immediate lessor,  
*ROSCOMMON* he may defend himself; but if we sanction this distress, it would be  
*UNION.* indirectly charging the lessor with a greater sum than he is liable  
 for.]

*O'Hagan* replied.

It cannot be argued that every rate in which a mistake occurs is a nullity, especially as an appeal is given to the party aggrieved; and if there be no appeal by the party, then allowing this proceeding to be had recourse to, in order to avoid the rate, would nullify the Act of Parliament. If the facts were as in *Lord Lucan's case*, it might be shown the plaintiff was not liable; but here the party who is liable is before the Court, and he ought not to be allowed to take advantage of this mistake in the rate book. Under the old Act 1 & 2 Vic., c. 56, the person in actual occupation was bound to pay, and he was entitled to deduct a proportion of the rate from the landlord; but where the occupier was not primarily liable, he was entitled to deduct the whole rate from the rent. The 6 & 7 Vic., c. 92, changed that course of proceeding, for the rate is now thrown on the immediate lessor.—[MOORE, J. It might be argued that the 3rd section was only applicable to lessors within the 1st section, and then the lessee would not be entitled to recover against the lessor, because he is not such a lessor as is therein described. Suppose M'Govern was rated, though not named in the rate book, would she have the same power of appealing?—Yes, under the 101st section: *Hutchins v. Chambers* (a).

LEFROY, C. J.

We entertain no doubt in this case. Taking the two Acts together, the matter comes to this—that a true rate must be made upon some rateable person. Under the first Act, it must be laid upon the occupier, there being no other person whom the law

(a) 1 Burr. 580.

authorised the Poor-law Guardians to rate; but then comes the second Act, enabling them to rate another class of persons. The moment that Act came into operation, the Guardians had the choice to elect one or other of those classes. The rate in question appears to have been made under the second Act, instead of the first, but that mistake cannot annul the rate; therefore, if the rate were not void, under the several provisions of the two Acts, the plaintiff, as a subsequent occupier, stands in the place of the original occupier, who might have appealed and alleged what he could against the levy. He does not do so; and he cannot now raise the objection as to what extent he ought to be recouped. We have nothing to do with that; we only say that the rate laid on was on a person in occupation and liable to pay.

M. T. 1852.  
*Queen's Bench*  
 RUSH  
 v.  
 ROSCOMMON  
 UNION.

CRAMPTON, J.

This rate is not a nullity. It was made on the supposition that M'Causland was the immediate lessor, upon whom only the rate could be made, and there was no appeal from that rating. If there had been an appeal, that mistake would have been set right, and then the rate would have been thrown upon the occupier.

PERRIN, J., concurred.

MOORE, J.

I felt some difficulties in this case, which have now been removed. It appears to me that the principle of the decision in *Lord Lucan's case* is applicable to the present; and though a mistake has been committed, no greater hardship is imposed upon the tenant than if the rate were properly made. I think the rate was not a nullity.

M. T. 1852.  
*Queen's Bench*

KENNAN v. GARDE.

Nov. 19.

Sundays are not to be reckoned in notices of trial or notices of inquiry. The ten days' notice of trial must therefore be counted exclusive of Sunday.

MEAGHER, with him *Carr*, showed cause against a conditional order, that the verdict had in this case be set aside, upon the ground that the notice of trial was insufficient, and not such notice as was required by the Act of Parliament, and the 133rd General Rule, providing for such notice.

The objection here is a narrow one—that the notice of trial served was one day short, by its being served on a Saturday; and as Sunday intervened, the service did not comply with the 133rd General Order, which provides that “ten days’ notice of trial shall “be given in country cases, and six days’ in town cases, and the “plaintiff may countermand his notice of trial, five days in country “cases, and three days in town cases, before the time mentioned “therein as the time of trial.”

But we have a preliminary objection to this conditional order being entertained, because, when it was served, they did not furnish at the same time the affidavit on which it was rested; and further, the motion being not strictly a new trial motion, but one to set aside proceedings for irregularity, the order should specify the grounds of the irregularity.

PERRIN, J.—That objection should have been made at an earlier period.

If Sunday is to be counted in the notice of trial, then this notice was sufficient; and under the old practice Sundays were always included and counted in the fourteen running days, and even in the short notice of trial they were also counted. The 4th General Order provides for the computation of time, and it says—“When by any “rule, order, or proceeding, time is to be computed by days, it shall “be exclusive of the holidays in the statute 13 *Vic.*, c. 18, and in “these Rules mentioned, &c.; and in all cases it shall be exclusive “of the first, and inclusive of the last day, unless the last be a

"holiday," &c. Notice of trial is not a proceeding within that Rule—it is but the notice of a proceeding.—[MOORE, J. Do Sundays count in general notices?—Some of the officers hold they do not. This notice was served on Saturday, for the Wednesday week following, and was amply sufficient.

M. T. 1852.  
*Queen's Bench*  
 KENNAN  
 v.  
 GARDE.

*Hickey and M'Dermott, contra.*

The ten days' notice is exclusive of holidays, and yet if this notice of trial be held sufficient, it will virtually repeal the 13 *Vic.*, c. 18, s. 23, which declares Sunday to be a holiday within that Act. The ten days must be exclusive of holidays, and it has been so held in an unreported case decided in the Court of Exchequer, *Corrigan v. M'Gower*.—[PERRIN, J. Two days' notice of bail is to be given in town cases—does that include Sundays?]

*Carr* replied.

*Per Curiam.*

Sundays do not count in notices of trial; this verdict, therefore, must be set aside with costs.

Order absolute, with costs.

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NOTE.—Under the Common Law Procedure Act, 16 & 17 *Vic.*, c. 113, s. 103, "ten days' notice of trial or inquiry shall be given, and shall be sufficient in all cases, whether at Bar or *Nisi Prius*, in town or country, unless otherwise ordered by the Court or a Judge, and the expression 'short notice of trial' in any order or consent shall be taken to mean four days." There is thus a uniform period assigned for notices of trials of town and country cases, and the number of days is to be reckoned exclusive of the day on which it is given, and inclusive of the last day. The countermand of notice of trial may be given four days before the time mentioned in the notice: s. 104; and this also applies to town and country cases, and both the sections include also notices of inquiry. All holidays, except Sunday, are included in the number of days, unless the holiday fall on the last day, in which case the day following is to be regarded the last of such days: s. 232.



M. T. 1852.

*Queen's Bench*

## HODDER v. KIFT.

Nov. 23.

An attorney, being the assignee of a judgment, cannot enter satisfaction on the judgment without a warrant of attorney.

EXHAM, on behalf of the defendant, moved for liberty to enter satisfaction on the judgment in this case. The application becomes necessary as there is no warrant of attorney for that purpose. The defendant is the assignee of the judgment, and is an attorney of this Court, and is therefore entitled, on his own behalf, to enter satisfaction without a warrant; but the officer refuses to allow satisfaction to be entered, on the ground that it would be evading the £1. 10s. stamp which is necessary on a warrant of attorney.

MOORE, J.\*

The uniform practice has been to have a warrant of attorney to enter satisfaction, and it is the duty of the officer to ascertain that such is executed, and on the proper stamp. There is nothing on the record to show that Mr. Kift is an attorney; and at some future period a question might be raised as to that fact.

\* *Solu.*

## In re JAMES CASEY, and others.

Nov. 8, 12,

23.

The finding of a Coroner's jury can only be quashed for defects apparent on the face of the inquisition, or

In the matter of an inquisition taken at Six-mile Bridge, in the county of Clare, on view of the bodies of James Casey, and others, deceased, in the month of August 1852.

The *Attorney-General* (Napier), having issued his fiat for that for the misconduct of the Coroner. An allegation, therefore, of the insufficiency of the evidence returned by the Coroner to support the finding, is not ground adequate to rest an application to set aside the inquisition.

purpose, a writ of *certiorari* was obtained (on an order pronounced by MOORE, J., in Chamber), directed to the Clerk of the Crown for the county of Clare, to return into the Court the several inquisitions, depositions and all matters incident thereto, had on view of the bodies of James Casey, and others, deceased, at Six-mile Bridge, in the county of Clare. In pursuance of this *certiorari*, the proceedings having been returned, the *Attorney-General* obtained an order *nisi*, that the inquisitions held by the Coroner of the county of Clare, on the 18th of August 1852, be quashed, on the ground that the finding of the Coroner's jury was against law and evidence.\* This conditional rule was directed by the Court to be served on the attorney who appeared at the inquest on behalf of the next-of-kin of the deceased persons: and same having been accordingly served on the 8th of November—

M. T. 1852.  
Queen's Bench  
In re  
CASEY.

*J. D. Fitzgerald*, as Counsel for the next-of-kin, applied that they might be furnished with copies of the depositions given at the inquest: these were voluminous, and to take them out at their own expense would be a serious matter. By the provisions of 2 *W.* 4, c. 48, s. 22, the parties are entitled to this, and the Court will make the order, if the Crown will not consent.

The *Solicitor-General* (Whiteside).

The Crown do not resist this application, though it is a novel one.

The Court made a rule accordingly.

It appeared from the depositions that an unfortunate collision had occurred at the village of Six-mile Bridge, in the county of Clare, on the occasion of the election for the return of two Members of Parliament for the county, between some of the inhabitants of the district and a detachment of military sent to protect the voters in going to the poll. Stones and other missiles were thrown at the soldiers, and they fired—the result of which was that several lives

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\* The ordinary practice, and it would seem the more correct course, would have been to have had the matter set down on *concilium*.

M. T. 1852.  
*Queen's Bench*  
*In re*  
 CASEY.

were lost; and a Coroner's inquest having been held on view of the bodies of the several persons so killed, the jury returned a verdict of wilful murder against some of the firing party, and the magistrate who accompanied them.

At the inquest, evidence was given of a conflicting character: it was attempted to be shown by some witnesses that the military had acted recklessly, and that the firing was wanton and unprovoked: whereas others alleged that the soldiers were perfectly justifiable in firing, as same was in defence of their lives, which were imperilled. Admittedly, no orders to fire had been given by the officers in command of the detachment; but the magistrate who accompanied the party was charged with having given the order; that, he positively denied on oath. The evidence as to the identification of the persons who had fired was also conflicting.

Nov. 12. The *Solicitor-General* (Whiteside), with him *Martley, Hayes* and *Thomas Graydon*, appeared to have the order made absolute to quash the inquisition.

*J. D. Fitzgerald*, on behalf of the next-of-kin, claimed the right to begin, inasmuch as a notice to show cause had been served on their behalf, and there was no cross notice served to make the order absolute.

The *Solicitor-General*.

The Crown, as a matter of right, is entitled to precedence.

LEFROY, C. J.

It is *ex gratia* allowing Counsel to appear on this motion on behalf of the relatives of the deceased. Even were it not so, the right of the Crown to begin cannot be affected by the form of the proceedings.

PERRIN, J.

The case is to be argued as if it were set down on *concilium*. The right to begin, therefore, is undoubtedly in the Crown.

The *Solicitor-General*.

M. T. 1852.  
Queen's Bench  
In re  
CASEY.

This is an application to quash an inquisition, on the ground that there is nothing in the depositions to sustain the finding of the jury, and the Court must necessarily look into the depositions. There is no objection to the inquisition in point of form. The Court of the Coroner is a Court of Record, and his duty is to inquire into the facts bearing on the death of the deceased: 1 & 2 *Ph. & M.*, c. 13, s. 5; 2 *Hawk. P. C., Coroner*, b. 2, c. 9, s. 31; 2 *Hale P. C.*, p. 65. A writ of *certiorari* is the only means open to ascertain the correctness of such an inquisition: the form of the writ is given in 2 *Gude Cr. Pr.*, p. 190; *Fitz. N. B.*, p. 354. If this Court see any thing irregular or illegal on face of the depositions and findings returned to such writ, it will quash them: *Anon.* (a). The Court will for that purpose look into affidavits charging the Coroner with undue practices: *The King v. Bonny* (b); 6 *Vin. Abr., Coroner*, c. 14; *Rex v. Stukeley* (c). If the premises will not warrant the finding of the Coroner's jury, the Court will quash the inquisition: *Rex v. Parker* (d); *Rex v. Hathersal* (e); *Smith's case* (f); 5 *Com. Dig., Coroner*, g, 12, *In the Matter of Culley* (g). That was an application to set aside the finding of a Coroner's jury, for defects apparent on the face of the inquisition. Denman, C. J., in giving judgment, says:—"The inquisition is a nullity. I doubt whether there is any finding at all. The jury in effect say that the slaying of Culley was justifiable, because certain other persons had either acted improperly or been guilty of neglect of duty. There is no pretence for saying, on the facts found, that it was justifiable homicide. There is nothing to show that the deceased had ever given any provocation for the assault. I entertained at first some doubt whether the inquisition ought to be quashed by this Court, except on the application of some party interested. On further consideration, however, I think it may be quashed on the application of the Crown, which has an interest in the general

(a) 1 Vent. 352.

(b) Carth. 72; S. C. 1 Salk. 189.

(c) 12 Mod. 493.

(d) 2 Lev. 140.

(e) 3 Mod. 80.

(f) Comb. 386.

(g) 5 B. & Ad. 230.

M. T. 1852. "administration of justice." *In the Matter of J. L. Daws* (a), the  

*Queen's Bench*  
*In re*  
CASEY.
jurisdiction of the Court to quash the inquisition is recognised; but the application there was refused, because of the peculiar circumstances of the case.

*J. D. Fitzgerald, Sir C. O'Loughlen and Coffey, contra.*

The effect of granting this application would be, that the Court would thereby take on itself the province of the Coroner's jury. The 4 *Ed.* 1 defined the duty of the Coroner: 2 *H. P. C.*, p. 60; and that duty is but to note the effect of the evidence, and take such evidence as he thinks material: that, however, is no part of the inquisition: 10 *Car.* 1, sess. 2, c. 18. It was not until the 9 *G.* 4, c. 54, s. 4, that the Coroner was required to return the evidence in the way of depositions, nor did that make the evidence a matter of record, within the meaning of that statute. In the cases cited, the inquisition was set aside for defects apparent on it, or misconduct in the Coroner himself. Here, admittedly, there is no informality apparent, and the conduct of the Coroner is not questioned. But, even assuming the Court had jurisdiction, it is an application to its discretion, and clearly a case in which, under the circumstances, it will not interfere: *Ripley v. Oldfield* (b); *Rex v. Dalton* (c); *The King v. Rose* (d); *Lord Mohun's case* (e).

*Martley* replied.

It cannot be argued that the Coroner's jury is only to look to the evidence on one side, and that if a *prima facie* case be made out, they are warranted in a finding; that is not the purpose of the Coroner's jury—they are sworn *ad inquirendum*, so that if they confine themselves to merely criminatory circumstances, their verdict is worthless: 1 *Russell on Crimes*, pp. 29, 541. *In re Culley* shows that this Court has clearly jurisdiction to deal with the findings: *The Queen v. Mallett* (f). There is nothing to limit the jurisdiction of this Court over inferior tribunals: *The King v.*

(a) 8 A. & E. 936.

(c) 2 Str. 911.

(e) 1 Salk. 103.

(b) Sir T. Jones, 198.

(d) 2 Bar. 82.

(f) 1 Cox, C. C., 336.

*Stanlake (a)*. The *Attorney-General* is not entitled to any particular favour, but it is his duty to see criminal justice properly conducted: *Garnett v. Ferrand (b)*; *Foster Cr. Law*, p. 266.

M. T. 1852.  
Queen's Bench  
In re  
CASEY.

*Cur. ad. vult.*

LEFROY, C. J.

This case comes before us on a motion to quash several inquisitions finding verdicts of wilful murder against several persons therein named. It is grounded, not upon any defect in form or substance apparent on the face of the inquisition, nor for any alleged misconduct of the Coroner; but upon an allegation of the insufficiency of the evidence returned by the Coroner to support the finding of the jury. Counsel on behalf of the next-of-kin of some of the deceased have been heard on the motion; and now the important question for our decision is—whether it is competent for the Court to enter upon such an inquiry, and to quash an inquisition upon the ground suggested?

Nov. 23.

The case has been argued with great ability and research on both sides. Cases have been found which may seem to furnish an analogy, and have been relied on for that purpose;—some of these establish the undoubted right of the Court to look into the depositions, and thereby to control the finding of the jury, for the purpose of bail. To this effect are the cases of *Rex v. Dalton (c)*, and the MS. note of the case before Lord Mansfield, given to the editor of *Strange*, in which he held that the depositions, and not the inquisition, were to guide the discretion of the Court as to bail: to which may be added the case of *Rex v. Magrath (d)*. There is then, besides these cases, also that strong *dictum* in the case of *Rex v. Hethersall (e)*, in which the Court is represented to have said to the Counsel—“If you can produce an affidavit that the jury did not go according to the evidence, the Court will grant the application to quash the inquisition.” Strong arguments have also been urged for the convenience, and even the necessity, for the existence of such a jurisdiction, to protect the admittedly

(a) 1 Mod. 82.

(b) 6 B. & C. 611.

(c) 2 Stra. 911.

(d) 2 Stra. 1242.

(e) 3 Mod. 80.

M. T. 1852.  
*Queen's Bench*  
*In re*  
 CASEY,

innocent. Still, however, no reported case has been found; and neither in this country, nor upon a search in the Crown office in England, can any instance be found of the actual exercise of such a jurisdiction by an order quashing an inquisition for the insufficiency of the evidence to support the finding. Under these circumstances, having no precedent for our guidance, we are bound to consider maturely the consequences of complying with such an application, not only in respect to the individuals concerned on each side, but not less so as regards the interests of public justice in the due administration of the law. See then, in the first place, if we are to review this mass of evidence for the purpose of controlling the finding of the jury, what a task have we to engage in—to judge of its effect upon paper—without the advantage of observing or knowing any thing of the demeanour of the witnesses, which is so often found to be the best test of their credit. But supposing this difficulty out of the way, look to the result of a decision, one way or the other, founded on our forming and expressing an opinion on the sufficiency or insufficiency of the evidence to support the finding. It is admitted that our decision to quash the inquisition would not prevent a bill being sent up to the grand inquest of the county. It would be the right of those who seek to support this inquest to do so; and if so, can it be conceived that such a bill could come before them, unprejudiced by the deliberate and (it is not too much to say) authoritative opinion of this high tribunal, announcing that the evidence was not sufficient to sustain the finding of the inquisition? On the other hand, supposing us to decide that there is evidence to warrant such finding, would the traversers (if arraigned on this inquisition, which they might be) go to trial unprejudiced by a decision which would be a warrant, or, as it might be said, an apology for the petty jury to confirm the finding of the inquisition? Are we then, in the absence of all precedent, to disregard these objections and difficulties? We do not feel that we can; and therefore, without forming or expressing any opinion whatever upon the merits of the finding, or the sufficiency or insufficiency of the evidence to sustain it, we say—

No rule on the motion.

M. T. 1852.  
*Queen's Bench*

## O'DONNELL v. O'DONNELL.

Nov. 20.

CHATTERTON moved to show cause against a conditional order for an attachment against John O'Donnell, who had been summoned as a witness in this case, and failed to attend at the trial.

When affidavits are filed as cause against a conditional order, a motion to show cause is irregular.

*Sullivan, contra.*

There is a preliminary objection to this motion, founded on the 200th General Rule. We have not given notice to make the order absolute. The 200th Rule says:—"Where a conditional order shall have been obtained, and an affidavit shall have been duly and in due time filed for showing cause, and notice thereof duly given, such affidavit and notice shall be good cause against making the conditional order absolute, unless the party obtaining such conditional order shall, within six days after the filing of such affidavit, and due notice thereof, give notice of applying to the Court to make the conditional order, or some part thereof, absolute, and shall move such notice according to the course of the Court; and if such notice be not given and moved within the time aforesaid, the party on whose behalf such affidavit has been filed, provided he has been served with the conditional order, shall be entitled to a Side-bar rule, allowing the cause shown against the conditional order, as an authority for taxing the costs, and making and filing such affidavit and giving notice thereof, and such costs shall be taxed accordingly," &c. Here they have filed no less than four affidavits on the other side, and the six days have not elapsed since we served the conditional order, and yet they serve notice of motion to show cause. The 201st General Rule prescribes that "Where a conditional order shall have been obtained, and no affidavit shall be filed as cause, but notice of motion to show cause shall be served within the time limited by the conditional order, the party serving such notice

An attachment will not be granted against a witness for non-attendance at a trial, pursuant to a subpoena, unless he be called in Court by the crier, and a note taken of his non-attendance by the Judge's registrar.



M. T. 1852. *Queen's Bench* "shall, within the time aforesaid, file an affidavit of the due service  
O'DONNELL "of such notice, and bring forward and move such notice according  
v. "to the course of the Courts; and in case the notice to show cause  
O'DONNELL. "shall be discharged, the order shall be made absolute." We there-  
fore should be the moving party.

*Chatterton* replied.

All we were bound to do was to file an affidavit, and serve notice of having so done. But we have done more, and have served notice of showing cause.

MOORE, J.

But the other side may have thought your affidavit sufficient, and proceeded no further.

CRAMPTON, J.

You seek an order you have no right to get.

*Per Curiam.*

Let the notice to show cause be discharged, with costs.

Jan. 12. *Sullivan* now moved to make the order for the attachment absolute.

*Chatterton, contra.*

The witness was actually in attendance outside the Court, but he was not called by the crier of the Court, only by the plaintiff's attorney.

The Court refused the application, as it did not appear on the Judge's report that the witness had been, according to the usual practice, called by the crier, and there being no note taken by the Judge's registrar of the witness's non-appearance.

H. T. 1853.  
*Queen's Bench*

CARTWRIGHT v. BALL.

Jan. 14.

In this case a conditional order had been obtained for liberty to issue a *scire facias* to revive a judgment against the heir and tenants of the conusor.

Service of a *sc. fa.* substituted on a person who had acted as attorney for the conusor, and also on one who had acted as his agent, notice of the order being given to the creditors of the conusor who were in possession of his property.

The affidavit upon which this order was obtained stated that separate judgments had been obtained in Trinity Term 1818, against the defendant (since deceased), and his son; that he had died many years, leaving estates in the counties of Cork and Waterford; that in 1827 a custodiam was granted over the defendant's estate in the county of Cork, and that the custodiam was renewed in 1831, and under these grants the plaintiff went into possession by his agent. A receiver was subsequently appointed, and the estate was sold by the Court of Chancery in 1837, but the proceeds of that sale were insufficient to reach plaintiff's judgment. Interest had been paid on plaintiff's judgment in February 1833, by the agent appointed over the rents granted in custodiam. It further appeared that J. H. Ball, the heir-at-law of the defendant, had left Ireland several years since, and was now residing in America—being entitled, subject to the charges thereon, to a fee-simple property in the county of Waterford, over a portion of which a receiver had been appointed, and over the residue Thomas P. Carew his brother-in-law was agent, acting under a power of attorney for him, and that James Barry was his solicitor and attorney, having acted for him in a certain matter pending in Chancery, and also in an ejectment suit.

On this affidavit the conditional order was granted, directing that the plaintiff should be at liberty to issue a *scire facias* to revive the judgment in this cause, and that service of this writ and of this order upon Thomas P. Carew and James Barry respectively, and also upon Thomas White, a creditor in possession, be deemed good service.

H. T. 1853.  
*Queen's Bench*  
 CARTWRIGHT  
 v.  
 BALL.

As cause against this conditional order, affidavits were filed by Carew and Barry. Carew, in his affidavit, stated that he had ceased to act as the agent of J. H. Ball at the time that some property he was entitled to got into the hands of his creditors, and that he had no communication with him for three years last past, and did not know where he resided: that he had left this country twenty-two years since, and at that time was not possessed of any property; but that he (deponent) received the rents of a property in Youghal, which devolved on J. H. Ball in 1847, under an old family settlement, and had applied some of the rents in payment of the expenses attending that property, and Barry's costs in resisting the appointment of a receiver. That having been put out of possession by a creditor of J. H. Ball, he had never since received any rents or money on his behalf; that he had written to Ball, enclosing him a power of attorney appointing deponent his agent, but to this he had received no reply.

Barry, in his affidavit, denied all knowledge of J. H. Ball, or of his residence; and stated that he merely acted under the direction of Carew.

*Macdonogh* and *S. J. Armstrong* moved to make the conditional order absolute.

*J. D. Fitzgerald* and *O'Flynn*, contra.

LEFROY, C. J.

This is a question of great importance. There has always been a distinction observed between the practice as to the substitution of service of an original writ and of a *scire facias*; and the Court have always recognised that distinction, and have carried it out by the General Orders. Service is here sought to be substituted on a party who has confessed a judgment, and is residing out of the jurisdiction of the Court; he therefore is not entitled to any favour from the Court. It is admitted that the service of the *scire facias* would be deemed good, if served on a person representing the defendant, as to his property. Here we have him represented by

his creditors—they being in possession of his property—that being a possession sufficient to prevent the operation of the Statute of Limitations; he therefore is represented as to his property, and we propose to give these creditors notice of this order.

H. T. 1853.  
*Queen's Bench*  
CARTWRIGHT  
v.  
BALL.

The 171st General Order increases the facility of serving the *scire facias*; for it allows it to be served on the wife, daughter or other member of the defendant's family. His brother-in-law was acting for him in this country, and he must be considered as a member of his family. He employed an attorney for him, and took proceedings on his behalf, but he says he is not in receipt of the rents, because the defendant's creditors are in possession; but there is nothing to show, if they were paid off, that he would not resume the possession: he must, therefore, be taken to stand in the position of his agent. The 172nd General Order provides that where service of the *scire facias*, as directed by the 171st Rule, cannot be effected, and that due and proper means were used to effect such service, the Court will direct such substitution of service, and impose such terms as they think fit. The widest discretion is thereby left to the Court, to be regulated by the circumstances of each case. Here we have Carew in the position of an agent, on whom it will be incumbent to resume the receipt of the rents, for he incurred a debt which the attorney must be paid out of the rents. Looking, therefore, to the circumstances of the case—Carew not denying that he could find out where the defendant is—we think that we ought to substitute service in this case, by serving Carew and Barry, and the creditors of the defendant.

CRAMPTON, J.

I consider Carew the agent, and Barry the attorney, of this defendant, just as much as when Carew was in receipt of the rents. There is no doubt, when the creditors are paid off, Carew might again resume the possession; and there is nothing to show that it is not in Carew's power to communicate with the defendant.

PERRIN, J., and MOORE, J., concurred.

H. T. 1853.

*Queen's Bench*

## WALDRON v. JONES.

Jan. 11.

A plaintiff in a cause, having obtained the costs of two interlocutory motions, each under the sum of £10, will not be allowed to consolidate the two sums, and thereby entitle him to issue a *ca. sa.*, as such would be an evasion of 11 & 12 Vic., c. 28.

S. FERGUSON, on behalf of the plaintiff, applied to make absolute so much of a conditional order as directed the payment to the plaintiff of £11. 0s. 11d. It appeared that the costs of two interlocutory motions had been obtained by the plaintiff in this case, but the costs of each motion were under £10, and consequently no execution against the person could issue. Thereupon an order had been made by Greene, B., in Chamber (hearing motions for all the Courts), that the plaintiff might be at liberty to consolidate the two sets of costs, amounting to £11. 0s. 11d., and that the defendant should pay the same; and in the event of his default, that plaintiff might be at liberty to issue execution against the person of the defendant for the amount.

The necessity for this application arises from the provisions of 11 & 12 Vic., c. 28, "an Act to amend the law of Imprisonment for Debt in Ireland," &c., which enacts that no execution shall issue for a sum under £10. These costs are respectively £5. 0s. 7d. and £6. 0s. 4d.; and we would be unable to recover either unless we be allowed to consolidate them.—[MOORE, J. But why apply to make absolute part only of the conditional order?—The 200th General Order, by implication, authorises such an application, for the words of it are, "give notice of applying to the Court to make the conditional order, or some part thereof, absolute."—[CRAMP-  
TON, J. The words "issue execution," in the conditional order, mean any execution—not merely execution against the person, but against goods—why, therefore, not have the entire order made absolute?—We think it safer to abandon the latter part of the order.

*Purcell*, contra.

The true reason for omitting the alternative part of the order is, because the 11 & 12 Vic., c. 28, makes arrest for a debt under £10

illegal; and the object of the plaintiff in abandoning the latter part of the conditional order is with a view to withdraw that question from the consideration of the Court. If the order for consolidating these costs be upheld, the object of that Act of Parliament would be frustrated.—[MOORE, J. There could be no objection to a *fi. fa.* issuing.—CRAMPTON, J. The Court cannot issue process for costs amounting to less than £10. Suppose a civil-bill decree for different sums, would the plaintiff be allowed to go into the Assistant-Barrister's Court, and consolidate them?—Certainly not; and a further fact here is, that some of the items taxed are so by anticipation, as certain fees on the prospective execution, which of course have not been paid.

H. T. 1853.  
*Queen's Bench*  
 WALDRON  
 v.  
 JONES.

*Ferguson* replied.

If there be any objectionable item in the costs, it should have been reviewed on the taxation. The object of 11 & 12 *Vic.*, c. 28, was, not to prevent a party adding together as many claims as he had against the same person, arising in the same way, but that if on a decree or order there was a less sum due than £10, he was to resort to the civil-bill jurisdiction, and not be at liberty to arrest the defendant. It is not like splitting demands, or a cause of action; it is adding causes of action; and the Court, in its discretion, has power to order the defendant to pay these different sums.

*Per Curiam.*

The motion is untenable, and must be refused, with costs.\*

\* See *Roper v. Robinson* (1 Com. Law Rep. 141.)

H. T. 1853.

*Queen's Bench*

## BODKIN v. LEAHY.

Jan. 11.

An issue directed by the Incumbered Estates Court was, by the order, to be tried by a special jury; and the plaintiff having, in pursuance of 8 & 9 Vic. c. 109, obtained a writ of summons, and framed the issue accordingly, obtained in this Court an order for the special jury in the usual way. At the trial, the Judge, not being asked for that purpose, did not give a certificate that it was a fit case for a special jury; but some time after, on the request of plaintiff's Counsel, the Judge gave a certificate to that effect, which did not appear on the back of the record. Held, that the Taxing-officer was right in allowing the costs of the special jury to the plaintiff.

W. DUGGAN, on the part of the defendant, moved that the Taxing-master be directed to review his taxation of the plaintiff's bill of costs of an issue tried at the Spring Assises for the county of Galway, and that he be directed to disallow the items for costs and charges connected with a special jury, struck in this cause on the application of the plaintiff, inasmuch as the Judge who tried the issue did not, according to the statute, certify that same was a fit and proper case to be tried by a special jury.

This was an issue directed by the Commissioners of the Incumbered Estates Court, to ascertain whether or not a certain mortgage, under which the defendant claimed, had been paid off, or was subsisting at the time the assignment of it to the defendant was made. The order directing the issue directed it to be tried by a special jury of the county of Galway; and the plaintiff, having issued a writ of summons, and framed the issue under the provisions of the Act 8 & 9 Vic. c. 109, s. 19, afterwards obtained in the usual way an order for a special jury from this Court. On the trial of the issue, the jury found for the plaintiff; but the plaintiff's Counsel did not apply to the Judge at the trial for, nor did the Judge then give, a certificate that the case was one fit to be tried by a special jury. The plaintiff, some time after the trial, obtained from the Judge a certificate in writing that the case was fit to be tried by a special jury; but as that certificate was not on the back of the record, and not obtained at the time of the trial, or within a reasonable time afterwards, the Taxing-officer was not justified in allowing the costs of obtaining and incidental to the special jury. The 3 & 4 W. 4, c. 91, s. 27, is precise on the subject; and in *Waggett v. Shaw* (a), Lord Ellenborough refused to certify for a special jury, when the application was made the day after the

(a) 3 Camp. 316.

trial.—[PERRIN, J. No doubt, the certificate should be given immediately after the trial: but does the Judge ever certify when the case is an issue out of Chancery?]  
 H. T. 1853.  
*Queen's Bench*  
 BODKIN  
 v.  
 LEAHY.  
 —When the issue is framed under the schedule to the Interpleader Act, it becomes a record of the Court out of which the writ of summons issues, and comes within the terms of the section of the Jury Act referred to.—  
 [MOORE, J. Who struck the jury?]  
 —The officer of this Court; and the Court itself made the order for the special jury. The writ of summons issued out of this Court, and the record was here made up, and went down for trial as an ordinary record; and the learned Judge should therefore have certified on the back of the record, immediately after the trial, in pursuance of the Jury Act, that the case was fit for a special jury.

*P. J. Blake*, for the plaintiff.

The practice adopted in the case of issues out of the Court of Chancery should be adopted in the present case. When an issue is directed by that Court, the officer of that Court usually strikes the special jury; and upon the trial of the issue, the Judge before whom it is tried is never required to certify that the case is one fit to be tried by a special jury. This was an issue directed by the Incumbered Estates Court, which gave no directions to the parties, and which has no officer or machinery by means of which the special jury could be struck.—[LEFROY, C. J. The new system was adopted in pursuance of an Act of Parliament, and was introduced in *ease* of the parties. The Judge who tries the case is handed the writ, and issue is at once joined.]—PERRIN, J. The provision in the Jury Act was introduced to save expense, and to throw on the party improvidently applying for a special jury the costs of doing so.—LEFROY, C. J. I must say I certainly thought it a very fit case for a special jury.]—The order of the Incumbered Estates Court directed the issue to be tried by a special jury.

LEFROY, C. J.

Both parties were entitled to the order for the special jury; and then the matter came before our own officer to tax the costs, and



H. T. 1853. *Queen's Bench* we are now called on to direct him to refuse to do what the Incumbered Estates Court would have directed to be done. As it is the first time the question has been raised, we will say no rule on the motion.

BODKIN  
v.  
LEAHY.

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NOTE.—8 & 4 W. 4, c. 91, s. 27:—"And be it further enacted, that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried shall, immediately after the trial, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

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### THE QUEEN v. ZACHARIAH WALLACE.

Jan. 28, 31.

On the trial of an indictment for a libel, the jury, at the close of the first day's proceedings separated without any order to that effect, or without the assent of plaintiff or defendant thereto being required, and assembled next morning, when the defendant's Counsel objected, in consequence of such separation, that the trial ought not to be proceeded with, but the Judge ruled against the objection, and ordered the trial to be proceeded with:—*Held*, that this did not amount to a mis-trial.

THIS was an indictment for a libel published in the *Anglo-Celt* newspaper, of which the defendant was proprietor. The trial was had before LEFROY, C. J., in the After-sittings of Michaelmas Term. The libel was as follows:—

#### "THE SIX-MILE BRIDGE TRAGEDY.

"The slaughter of the Irish people at Six-mile Bridge in the county of Clare has been under investigation for several days past. In another place we publish a portion of the evidence given at the inquest, by which it will be seen that the men under the command of Captain Eagar of the 31st Foot were guilty of wilful and deliberate murder. We presume from the evidence that Captain Eagar was in command of the party who

The Judge told the jury that they must find the publication malicious, but that *prima facie* it was a presumption of law that if a man published a libel on another, it was done maliciously.—*Held*, no misdirection.

"butchered our fellow-countrymen in open day upon their native  
 "soil; and if we were under any mistake whatsoever, it is owing  
 "to the attempt of the military authorities to stifle the investigation  
 "and frustrate the ends of justice. The 31st, we believe, lost its  
 "facings years ago, and it now rejoices in red cuffs and red collars.  
 "It seems by all accounts that the Clare election was of the ordi-  
 "nary hue of closely-contested elections in Ireland. Upon one  
 "side ranged the landlord influence, on the other the priests. All  
 "parties were of course much excited, but it is quite apparent  
 "that no sufficient provocation was given the cowardly wretches  
 "of the 31st to discharge their guns upon a defenceless crowd.  
 "Indeed it has been proved by Mr. Wilson, of Belvoir, a Protestant  
 "gentleman, that the populace surrendered their sticks to him before  
 "the military entered the village. This alone would show that no  
 "attack was premeditated by the people. We trust the Govern-  
 "ment will act impartially in the matter, and punish the guilty  
 "parties, whether dressed in red, black, or grey."

H. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 WALLACE.

There were several counts in the indictment. One count charged  
 the defendant with having seditiously published the libel; another  
 count charged that the publication was false and malicious, and with  
 intent to prejudice the officers and soldiers of the 31st Infantry. To  
 this indictment the traverser pleaded not guilty, and a special plea  
 of justification, alleging that the paper in which the libel appeared  
 contained a fair and impartial report of the proceedings at the  
 Coroner's inquest, and that the article complained of was a just  
 inference from that report. The trial occupied two days, and on  
 the close of the first day's proceedings, the CHIEF JUSTICE having  
 adjourned the Court and retired to his chamber, without any obser-  
 vation made by Counsel or Court, the jury left their box and went  
 to their respective residences. The CHIEF JUSTICE was thereupon  
 sent for, but he could then make no order, as the jury had dispersed.  
 On the following day, the Counsel for the defendant objected to the  
 trial proceeding, but ultimately he stated his case, on the Court  
 intimating the objection was not tenable. Some objections were  
 also made to the admissibility of the evidence received at the trial,  
 but these were not much pressed.

H. T. 1853. *Queen's Bench*  
 THE QUEEN  
 v.  
 WALLACE. The CHIEF JUSTICE having charged the jury, a verdict was had for the Crown; but before the finding was delivered, one of the jury asked the CHIEF JUSTICE whether the word "malice" being in the indictment, they were not to be satisfied that the traverser was actuated by a malicious intention toward the persons referred to in the publication? and the CHIEF JUSTICE replied, by stating that undoubtedly the jury must find the publication was malicious, but that *primâ facie* it was a presumption of law, that if a man published a libel on another, that was done maliciously. The defendant's Counsel objected to this definition of malice; and this was relied on as a misdirection, as it was contended that this was withdrawing from the jury the question of malice or no malice in the publication.

*Fitzgibbon* now moved for a rule *nisi* to set aside the verdict, and for a new trial, on the grounds that evidence was rejected which ought to have been received—that evidence was received which ought to have been rejected—that in consequence of the separation of the jury there was an irregularity sufficient to avoid the verdict,—and for misdirection.

*Cur. ad. vult.*

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Jan. 31. On this day, CRAMPTON, J., delivered the judgment of the Court, owing to the indisposition of the CHIEF JUSTICE, who however was present during its delivery.

CRAMPTON, J.

In this case, which was an indictment for a libel, and a special plea on the part of the defendant, there was a verdict for the Crown; and Mr. *Fitzgibbon*, on a former day, moved for a new trial, on four distinct grounds.

The four objections made were these;—First, that evidence was rejected which ought to have been received; secondly, that evidence was received which ought to have been rejected; thirdly, that in

consequence of the separation of the jury, the trial having lasted two days, and the jury having separated on the evening of the first day, there was an irregularity, which ought to avoid the verdict; and fourthly, on the ground of misdirection, suggesting that the question of malice, charged as it always is in an indictment for libel, should have been left to the jury as a matter of fact to say if they found malice in the particular publication. Upon all these grounds the Court is of opinion that the verdict must stand untouched. The first and second grounds were scarcely at all pressed. We think that no evidence was either received or rejected which ought not so to have been.

H. T. 1853.  
*Queen's Bench*  
THE QUEEN  
v.  
WALLACE.

As to the third ground of objection, the facts are these:—The trial necessarily extended to the second day. The Court adjourned at the close of the first day. The prosecutor's case had closed, and it remained then for the defendant's Counsel to go into his case on the following morning. The Court was adjourned by the LORD CHIEF JUSTICE, and, without any observation on the part either of Counsel or of the Court, all rose simultaneously, and the jury left the box and went to their respective homes. The defendant's Counsel then sent into his chamber for my LORD CHIEF JUSTICE, who had retired, but it was then too late, and he could make no order. Next day Mr. *Fitzgibbon* objected to the trial going on. However, he stated the case for the defendant; the trial went on, and finally closed, after the charge of the LORD CHIEF JUSTICE, in a verdict for the Crown. There is one case on the subject perfectly in point: *The King v. Kinnear (a)*. That was a trial of an indictment for a misdemeanour, which occupied more than one day. The jury, without the knowledge or consent of the defendant, separated at night. It was held that the verdict was not thereby void, and that the separation of the jury could form no ground for granting a new trial—it not appearing that there was any suspicion of any improper communication having been made to them. The facts here are very nearly the same. The only difference is, that on the second day of the present trial an objection was taken by Mr. *Fitzgibbon* to the case going on.

(a) 2 B. & Al. 462.

H. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 WALLACE.

It is to be observed, that if this objection were well founded, it would amount to a mis-trial; and the question then arises, whether the mere fact of the jury having separated, without any prejudice having occurred, and the trial proceeding the next morning, and a verdict being had for the Crown, should make the whole amount to a mis-trial. Suppose the verdict to have gone the other way, the same objection would equally have lain, and there should have been, in case it were yielded to, a new trial after the defendant had been acquitted. In *The King v. Kinnear*, Abbott, C. J., after stating the facts of the case, said :—" I am of opinion that in the case of a "misdemeanour the dispersion of the jury will not avoid the verdict; "and I found my opinion upon the fact that many instances have "occurred of late years in which such a dispersion has been permitted in the case of a misdemeanour, and every such instance "proves that it may lawfully be done. It is said, indeed, that these "instances have taken place by consent. The consent of the defendant, however, can make no difference, and ought not to be asked; "for it is obvious that he cannot exercise a free choice in such a "case, through the fear that if he refuse, it would excite a feeling "in the jury adverse to his interests. I am also of opinion that the "consent of the Judge would not make any difference." And Bayley, J., says :—" It seems to me that this forms no ground for a new trial."—Holroyd, J. " If that separation has taken place "improperly, the jury may be punished for it, or, if it be suggested "to the Judge at the time, he may, if he think it necessary, prevent "that separation from taking place. If, in this case, it appeared that "the jury had been tampered with, or that this was a verdict "against evidence, there would be some ground on which the Court "might proceed."—Best, J. " It is said there has been a mis-trial "on account of the separation of the jury, but I am alarmed at the "extent to which that proposition would go." Now, at this trial, there was no objection made to the Judge at the time of the separation of the jury, but, on the next morning Mr. *Fitzgibbon* noticed the matter, and objected to the trial being proceeded with. If there had been any tampering with the jury, it would have been a good ground of objection; but no prejudice having taken

place, it is expressly laid down in the authority referred to, that in case of a misdemeanour, the separation of the jury is no ground of objection. Under these circumstances, we have not the least difficulty in refusing to grant a new trial, upon the third ground of objection.

H. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 WALLACE.

The objection upon which Mr. *Fitzgibbon* dwelt most was that upon the ground of misdirection. The charge itself of the LORD CHIEF JUSTICE was not objected to at all. It was perfectly legal, and the ground of the alleged misdirection arose thus:—After the jury had retired for some time, they returned to their box, and put a question, which was, whether the word “malice” being in the indictment, they were not bound to be satisfied that the defendant was actuated by malice toward the prosecutors in the publication of the libel? The LORD CHIEF JUSTICE answered the question, by telling the jury that undoubtedly they must find that the publication was malicious; but he also told them that *prima facie* it was a presumption of law that if a man published a libel on another, he had published that libel maliciously. It was objected that in the course of this answer the LORD CHIEF JUSTICE gave a definition of malice which was not perfectly correct. His Lordship said that malice meant *legal* malice. Perhaps if we had recourse to subtle distinctions and nice criticisms, that would not (and his Lordship will excuse me for saying so much) be a perfectly exact definition of the word “malice;” but surely the meaning of it is, that when an injury is done—such as a libel does to an individual—the presumption of the law always is this, that the act so done is malicious, unless either by the circumstances of the publication itself, or by extrinsic evidence, the primary presumption of malice is rebutted. Now, I do not mean to say that malice is not a question for the jury; undoubtedly it is a question for the jury: but what we are now considering is, how is that question to be maintained in evidence?—and if the primary evidence establish that the act is libellous and injurious, the jury are bound, under the direction of the Judge, to presume malice in the first instance. In this case nothing was done in the way of evidence, but to prove the libel and its publication; and therefore the jury were called on in the first instance to presume malice. I think that there is no ground

H. T. 1853. *Queen's Bench*  
 THE QUEEN  
 v.  
 WALLACE. for imputing misdirection to my LORD CHIEF JUSTICE upon this account. His direction was perfectly right, that the presumption of law always is that a man intends what his voluntary act imports. The rule is precisely the same in civil as in criminal cases, and the objection seems to me to be founded upon a mistake which is extremely common in trials of this kind—namely, that the malice, which is the object of the charge in the indictment, is *personal* ill-will on the part of the defendant towards the prosecutor. It is no such thing. The wilful or voluntary doing of the injurious act, I will not say is malice, but is the *evidence* of malice, which the jury are called on to find as a malicious act on the part of the defendant. There can be no doubt that the presumption to which I refer can be a legal presumption only. There is a primary presumption that every man is innocent, and to that presumption every defendant is entitled. The second presumption is, that every act is malicious, if it be done wilfully and injuriously; but that may be explained; it may be rebutted. A publication which is on the face of it a libel, and injurious to the person assailed, may have been published innocently, and that may be shown, as I before stated, either by circumstances accompanying it, if any such there be, or by evidence extrinsic.

Now, that which I have been stating is the law of the land; and the law by which all such trials are regulated is established by abundant authority from the earliest period; but, there is a case on the subject that is so express that I shall at once advert to it, merely alluding to one other case, *The King v. Woodfall* (a), where Lord Mansfield lays down that every one who commits an injurious act is to be taken to have intended the thing which he has done; and that that which he has done, being done injuriously, and being done voluntarily, is to be taken to have been done maliciously. The case of *The King v. Harvey* (b), to which I have adverted, seems almost to anticipate the present. In that case the jury, after they had retired, returned into Court, and asked the Chief Justice (Abbott), whether it was or was not necessary that there should be a malicious intention, to constitute a libel? to which his Lordship replied:—"The man who publishes slanderous matter,

(a) 5 Burr. 2661.

(b) 2 B. &amp; C. 257.

"in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary." The case having come before the Court of Queen's Bench upon an objection made to this direction, Bayley, J., in giving judgment, refers to a case before Lord Ellenborough, of *The King v. Creevey* (a), as an authority in support of the correctness of the charge, and adds:—"The onus, therefore, of negating malice is properly cast on the defendant, for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference must do it by showing something to rebut the inference otherwise arising from his act;" and the other Members of the Court delivered judgment to the same effect. For my own part, I cannot conceive any thing more mischievous than the doctrine that the jury are to be at liberty to speculate upon the motives which have actuated the publication—whether in fact they are malicious or not; and thus, as it were, to enter into the breast of the individual who composed the libel. I charged the grand jury, when the bills of indictment in this case were sent up to them, in the very terms in which the law is laid down by the Judges in the last-mentioned case; and, after a careful search into the whole of the authorities, I may say that the same doctrine is laid down in all. Having found that the publication is *malum in se*, and a voluntary act on the part of the publisher, the jury were not concerned with the question of what the publisher actually meant, abstracted from the natural consequence of the act itself. Here the charge consists in having put forth a malicious publication; and this, in consequence of the principle of law which I have mentioned, is to be inferred from the act itself. The doctrine of law has likewise been fully laid down in 1 *Taylor on Evidence*, p. 98. For these reasons, I am of opinion, that the motion for a new trial is unfounded.

H. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 WALLACE.

PERRIN, J.

I think that this motion ought to be refused. With respect to the question as to the separation of the jury, that separation appears to

(a) 1 M. & S. 273.



H. T. 1853. have been quite accidental, and not noticed until the CHIEF JUSTICE  
*Queen's Bench* left the Court. I do not think that that ought of itself to vitiate  
 THE QUEEN the verdict, unless some valid objection could be urged thereto on  
 v. account of the defendant having been prejudiced by the separation.  
 WALLACE. I find that in several cases consent to the separation has been given,  
 and in others consent has not been given, and yet the verdicts were  
 upheld.

With respect to the question of malice, I hold that malice is an essential ingredient in a libel, and the late statute recognises this to be so. Malice consists in the intention to effect the injury and mischief imputed. What a man intends is to be inferred from what he does. If the terms of a document are calculated to injure, the intent may be inferred without the aid of extrinsic evidence. Such an inference the defendant may rebut, by adducing evidence to prove that the publication took place under circumstances which rebut the inference of malice; but, in the absence of such proof, the natural consequence of the words must ensue. We cannot dive into the heart of man. We must draw our conclusions as to his intentions from overt-acts, if such intention be apparent upon their face, and no evidence be adduced to rebut the inference. As to the case of *The King v. Harvey*, I shall simply repeat the judgment of Bayley, J., altering but one word. He says:—"A party must be considered in point of *law* to intend that which is the necessary or natural consequence of that which he does." I would rather say—"A party must be considered in point of *common sense* to intend that which is the necessary or natural consequence of that which he does." The same Judge continues:—"If I utter defamatory language of a particular person, the presumption is that I mean to do him a mischief." This appears to me to be a rule deducible from common sense. In the present case, looking at the terms of the present publication, which impute murder and cowardice, I feel no doubt that it is defamatory, and imports express malice. Therefore I see nothing to raise a question of the propriety of the verdict.

LEFROY, C. J.

I am glad that this motion has been made, as it has afforded an

opportunity of vindicating the law, and putting an end, I hope for ever, to the attempt to shake one of its main foundations by this species of question. If the test were to be what has been suggested, we should be involved in a metaphysical, impracticable, subtle inquiry—just as my Brother PERRIN has said in words that occurred to myself when the jury raised the question. That would be really calling upon a tribunal, utterly incompetent, to search the heart and mind, to ascertain that, whereby, according to the argument which has been urged upon us, it should decide. I do not know how the reputation of any man could be safe if such a construction of the law could be established as that which has been urged upon us.

My Brother MOORE desires me to say, he concurs in the judgment of the Court.

Rule refused.

H. T. 1853.  
*Queen's Bench*  
THE QUEEN  
v.  
WALLACE.

H. T. 1853.

Esch. Cham.

## Exchequer Chamber.\*

KIRWAN, in Error, v. JENNINGS and HARGREAVE.

Jan. 22, 26.

(Error from the Court of Exchequer).

A and B, on Assumpsit, for money had and received—Plea, the general issue. The case was tried before Pigot, C. B., at the Sittings after Hilary Term 1849, when the jury found a special verdict, which stated that the plaintiffs below (the defendants in error) had obtained a judgment in Easter Term 1848 against one James Porteous, on which judgment a writ of *fi. fa.* had issued, tested 26th of May

A and B, on the 30th of May, issued a *fi. fa.* against the goods of C, and there was delivered therewith a letter from A and B to the Sheriff, stating that "they did not wish to sell at present, unless he was forced by some other execution creditor, their object being to protect the property for the good of all the creditors of C, as the property would be forthcoming; they, placing reliance and confidence in C, did not wish any exposure at the present." On the 3rd of June they wrote a second letter, stating, "they supposed the Sheriff had taken possession under the execution ere that; if he had not, they directed him to do so, as they apprehended other executions would be sent in shortly, and directing the Sheriff to expose the defendant in execution as little as possible, as they had confidence in him; and that if a bailiff were sent, he should act as discreetly as possible." The Sheriff seized on the 5th of June, and on the following day an execution, at the suit of E and F, came in. The Sheriff sold on the 10th, and paid a portion of the proceeds to A and B, retaining the balance in his hands; and on the 15th of June, he made a return to the writs at the suit of E and F, stating, that he had no goods in his hands, save those seized under the prior execution. On the 6th of November, he made a return to the first writ, stating he had levied £211, out of which he paid £106 to A and B, and that he retained the balance in his hands in consequence of conflicting claims. On the 10th of November an application was made to the Court of Exchequer by A and B, requiring him to amend his return, and to pay over to them the balance in his hands. The Sheriff appeared on that motion, as also Counsel on behalf of E and F; and the Sheriff applied for an interpleader order. The Court refused to hear Counsel on behalf of E and F, and directed the Sheriff to pay over the balance to A and B.

An action having been brought by E and F against the Sheriff, for money had and received, a special verdict was found, setting forth the above facts.

*Held*, affirming the judgment of the Court of Exchequer, that under the circumstances the Sheriff was responsible to the plaintiffs for money had and received to their use.

*Held also*, that the order made by the Court of Exchequer was no answer to the plaintiffs' action, they not being parties to that order.

*Held also*, that the effect of the letters of 30th of May and 3rd of June was to suspend the execution of the writ by sale of the goods, until and unless another execution came in.

*Held also*, that the suspension order operated as a withdrawal of the execution; and the writ lodged subsequently in point of time acquired priority in point of law over the first writ.

\*PERRIN, J., and RICHARDS, B., *absentibus*.

1848, directed to the defendant below (the plaintiff in error) as Sheriff of Mayo. That the defendant got the writ on 6th June following, same having been delivered to his Returning-officer in Dublin, on the previous day. That, on the 29th May previous, a prior writ of *fiery facias* had been lodged with the Returning-officer against the goods of Porteous, at the suit of James Harshaw and Sophia Asken, as assignees of one Benjamin Wilson, which reached the Sheriff on the 30th; and on the 31st May the Sheriff received the following letter from the attorney of Harshaw and Asken :—

H. T. 1853.  
*Exch. Cham.*  
 KIRWAN  
 v.  
 JENNINGS.

"HARSHAW and ASKEN v. PORTEOUS.	}	SIR, "I yesterday delivered an execution to Mr. Fitzgerald, your Returning-officer, at the suit of plaintiffs, against the defendant's goods and chattels, for the sum of £580. The defendant resides at Ballina, and is a shopkeeper. The plain- tiffs do not wish at present to sell, unless you are forced by some other execution creditor, the object being to protect the property for the good of all the creditors of the defendant. The property, I understand, will be forthcoming. The plaintiffs place both reliance and confidence in the defendant; therefore they do not wish any expense at the present. I have written to them by this post for the amount of your fees. I consider you have a right to be paid them; but I am sure you will not, under the circumstances, charge the full fees, and indeed Mr. F. mentioned you would act liberally under the circumstances."
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(Signed)

"M. GALVIN."

On the 3rd of June, Galvin wrote a second letter to the Sheriff, in the following terms :—

"SIR—I suppose you have taken possession under the execution in this cause ere this. If not, do so, as I am apprehensive others may be sent shortly. This will ensure you your fees, and secure us at the same time. I would not expose the defendant but as little as possible, as the plaintiff appears to have confidence in him. Should you send a bailiff, then let him act as discreetly as possible."

(Signed)

"M. GALVIN."

On the 7th June 1848, a notice was received by the Sheriff, from the attorney for the plaintiffs (below), apprising the Sheriff of an

H. T. 1853. Exch. Cham.  
KIRWAN  
v.  
JENNINGS.

alleged error in the memorandum of the assignment of the judgment by Wilson to Harshaw and Asken, which error was amended on the 9th June following.

The special verdict further found that the goods were, on the 5th June 1848, seized by the Sheriff under the writ so lodged on the 29th of May; that the seizure was made at Ballina before the writ at the suit of Jennings and Hargreave reached the hands of the Sheriff; and on the 10th of June following the goods were sold, the proceeds amounting to £211, out of which sum the Sheriff paid £106 to Galvin, as attorney for Harshaw and Asken, retaining the balance in his hands; and on the 15th June 1848, he made the following return to the writ of Jennings and Hargreave:—"I certify that the within-named defendant had not any goods or chattels in my bailiwick at the time of the delivery to me of the within writ, or at any time since, whereout I could levy the within-mentioned sum, or any part thereof, as I am commanded, save goods and chattels to the value of £211, which I seized and sold by virtue of a certain former writ of *facias*, tested 27th May last, issued at the suit of J. Harshaw and W. Asken, against the defendant, marked for the sum of £580, and which last-mentioned writ was delivered to me on the 30th of May last, and prior to the delivery of the within writ; and I further certify, that the defendant had not and has not any other goods or chattels within my bailiwick, whereout I could levy the within sum, or any part thereof."

(Signed) "E. L. KIRWAN."

It further found, that this action was commenced on the 2nd August 1848, and on the 6th November 1848 the following return was made by the Sheriff to the writ, at the suit of Harshaw and Asken:—

"By virtue of the writ to me directed, I have seized and sold goods and chattels of J. Porteous, to the value of £211, the proceeds whereof, to the amount of £106, I handed over to the agent of the plaintiffs, and the residue whereof I have in my hands, and which I have retained in consequence of the conflicting claims thereto of the plaintiffs."

It further found that a conditional order had been granted by the

Court of Exchequer on 10th November 1848, directing the Sheriff to amend his return, and to pay Harshaw and Asken the balance of the £211 levied by him. On the 24th of November the Sheriff showed cause against the conditional order, seeking the benefit of the Interpleader Act. Jennings and Hargreave appeared on that motion, but the Court refused to hear Counsel on their behalf, and made absolute the conditional order; and in obedience thereto, the balance was paid by the Sheriff to Harshaw and Asken on the 20th of December 1848.

H. T. 1853.  
*Exch. Cham.*  
 KIRWAN  
 v.  
 JENNINGS.

The jury found, on issues sent to them by the Judge, that there was contained, in the letters of the 30th of May and 3rd of June 1848, a direction by Galvin to the Sheriff, continuing up to the delivery of the writ at the suit of the plaintiffs, not to sell under the writ of Porteous at the suit of Harshaw and Asken, unless pressed by another execution, and that the Sheriff acted on this direction.

The case was argued in Hilary Term 1851, before the Court of Exchequer, upon this special verdict, and judgment was given thereon in favour of the plaintiffs below (the defendants in error), upon which judgment a writ of error was brought.

*C. Kelly*, with him *Fitzgibbon*, for the plaintiffs in error.

The first execution having been lodged, with a direction not to execute it until another was lodged, amounts to no lodgment whatever; the second execution would therefore have priority over it; but the first direction having been withdrawn by the letter of the 3rd of June, the prior execution remained in full force from the time of the withdrawal, and consequently it takes priority over the execution lodged after the withdrawal. The case of *Hunt v. Hooper (a)*, which will be relied on by the other side, is quite distinguishable from the present; because the order to proceed in the present case preceded the lodgment of the second writ, but in that case it followed it.

Assuming, however, that the plaintiffs had a right of action, they could not recover in this form of action. A Sheriff is liable in such form of action only so long as he has money in his pos-

(a) 12 M. & W. 664.

H. T. 1853.  
*Esch. Cham.*  
 KIRWAN  
 v.  
 JENNINGS.

session, or if he pay it over voluntarily; but it cannot lie against a Sheriff who had no means of defending himself against a prior execution, he having been compelled to pay this money under the order of the Court of Exchequer: *Thurston v. Mills* (a). In that case the money realised by a sale under an execution was directed by the Court of Exchequer to be paid over to one of two conflicting claimants, but without deciding the priorities; and it was held that an action for money had and received did not lie: so here the money was paid over by direction of a Court of competent jurisdiction. The case of *Warmoll v. Young* (b) shows that the Sheriff is not liable while acting fairly in discharge of his duty.

*Mockler*, with him *Napier*, contra.

The jury by their verdict have given an interpretation to the letters, finding that the letter of the 3rd of June was a continuation of the former order, and not a withdrawal of it; and the Court below have confirmed that finding: *Lovick v. Crowder* (c). In that case the Sheriff had made a seizure, but the execution creditor directed him not to sell, and the debtor continued to have control over the goods seized, until another creditor sued out a second writ directed to the succeeding Sheriff; and it was held that it was his duty to inquire if the former execution were fraudulent, and if so, he was bound to levy under the second execution: *Wall v. Cahill* (d). A Sheriff is bound to execute writs according to their priority; but he is to sell under all writs in his hands: *Jones v. Atherton* (e); *Drewe v. Lainson* (f). If the first writ lose priority, the sale is for the credit of the second: *Chambers v. Coleman* (g). The Sheriff was therefore bound to pay the plaintiffs' writ first, before he satisfied the other. The case of *Thurston v. Mills* does not apply: there the goods were sold under the extent at the suit of the Crown, and not under the *fi. fa.*

As to the form of action, money had and received is maintainable:

(a) 16 East, 254.

(b) 5 B. & C. 660.

(c) 8 B. & C. 132.

(d) Cr. & D. Ab. N. C. 372.

(e) 7 Taunt. 56.

(f) 11 A. & E. 529.

(g) 9 Dow. 589.

*Swain v. Morland* (a). In that case goods had been seized under a *fi. fa.*, and part were sold on a Saturday, and the remainder on Monday; an extent tested on Monday was put into the Sheriff's hands at six o'clock, after the goods had been delivered to the purchasers, and the money received by the Sheriff, and it was held that the execution was executed, and that the party who issued the *fi. fa.* might recover of the Sheriff in an action for money had and received.

H. T. 1853.  
Esch. Cham.  
KIRWAN  
v.  
JENNINGS.

The case is precisely similar to *Pringle v. Isaac* (b). In that case the attorney of a judgment creditor delivered to the Sheriff a *fi. fa.* returnable on a day certain, with directions by letter not to execute it until the return unless another execution should come in, in the meantime, and afterwards sent in an *alias*, accompanied with the same directions; and the Sheriff, upon another execution coming in, issued warrants out and executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly first out of the money levied, and then paid over the remainder, in part satisfaction of the execution first delivered, and returned that payment, and *nulla bona* as to the residue; and it was held that the plaintiff could not maintain an action against the Sheriff for a false return: *Kempland v. M'Cauley* (c).

*Fitzgibbon* replied.

*Thurston v. Mills* shows the cases to which the action for money had and received applies; and the principle there laid down by Lord Ellenborough is not applicable to the present case. *Swain v. Morland* does not apply, for in that case the Sheriff was acting under the plaintiff's writ until the money came in. If the defendant did not receive the money for the use of the plaintiff, the action does not lie. In *Clarke v. Dignam* (d), it was left to the jury to say for whose account the defendant received the money; here there is nothing to show that the Sheriff had any money for the use of the plaintiff. There is a return of *nulla bona*, and the action, if

(a) 1 Br. & B. 370; S. C., 3 B. M. 740.

(b) 11 Pri. 445.

(c) P. N. P. C. 66.

(d) 3 M. & W. 478.



H. T. 1853. maintainable, should have been brought, as in *Pringle v. Isaac*, for a false return. If the Sheriff return *nulla bona* to an action for a false return, there is no case to show that an action for money had and received will lie. If he undertake to decide the priorities the remedy will not lie against him; money had and received will only lie where there is but one writ.

*Esch. Cham.*  
KIRWAN  
v.  
JENNINGS.

*Cur. ad. vult.*

LEFROY, C. J.

Jan. 26. This case comes before the Court upon a writ of error brought to reverse a judgment of the Court of Exchequer, given in favour of the defendants in error (the plaintiffs below). The judgment was given upon a special verdict found at the trial.

The action was brought by the plaintiffs against the defendant as Sheriff of the county of Mayo, to recover the amount of a levy made under an execution, which the plaintiffs insisted was levied for their use, and to which they were therefore entitled. The defendant, on the other hand, insisted that the money was not levied under the plaintiffs' execution; but that it was levied under a prior execution, and paid by him lawfully to that prior execution creditor: that, at all events, he paid the money to the prior execution creditor, under the order of the Court of Exchequer; and he insisted that that order operated as a protection; and lastly he insisted that this was not the proper form of action.—[His Lordship, having stated the facts, proceeded to say]:—

With regard to the order of the Court of Exchequer, we have nothing to do, beyond the fact that it was pronounced, and pronounced in the absence of the present plaintiffs, and therefore as to them is to be considered as *res inter alios acta*.

Upon the construction of the letters, we are all of opinion that, taken together, they amount to an order to suspend the execution of the writ by sale of the goods, until and unless another execution should come in.

The next question then is, what is the effect in point of law of that suspension order? The general rule is, that when two or more executions are delivered to the Sheriff, when he levies he shall pay

according to the priority of lodgment. That construction is founded on the Statute of Frauds, which enacts, that no execution shall affect goods but from the time of delivery of the writ to the Sheriff be executed. That there may be no question about the time, the Sheriff is ordered to take a note of the delivery, which note is to be his guide in adjusting the payment of the creditors. If then this general rule prevailed without exception, there could be no question. In point of time, Harshaw and Asken were the first to lodge their execution with the Sheriff. But that was accompanied by the letter, amounting to an unequivocal order not to sell unless some other writ came in. The effect of that, in point of law, was to suspend the order; it operated as a withdrawal of the execution; so that when the other execution came in, there was virtually no other execution in the Sheriff's hands: that such is the general law is decided in *Drewe v. Lainson*, by Lord Denman, where he says, "The duty of the Sheriff, when he has several writs of execution, is clear. He is to execute them according to their priority; which, as to writs of *fieri facias*, is according to the time of their delivery to him."

H. T. 1853.  
*Exch. Cham.*  
 HARSHAW  
 v.  
 JENNINGS.

With respect to the effect of the order suspending the execution, I shall refer to two cases. In *Kempland v. McCauley*, Lord Kenyon states his opinion to be, that the Sheriff must levy in the order in which he first receives: yet if the plaintiff in that writ direct it not to be executed before a distant day, and in the meantime another execution come, the Sheriff is not to keep the said writ hanging over the heads of the other creditors, but is to levy under the last execution as if no other had been delivered to him. In the next case all the authorities are collected: that was the case of *Hunt v. Hooper*. Parke, B., in delivering the judgment of the Court, says in that case, "We are therefore of opinion, that in this case the countermand of the execution of the writ was equivalent to its withdrawal at the time, and B's writ could not be considered as having been delivered to the Sheriff to be executed until the order to proceed after the delivery of the plaintiff's, and consequently the rule must be absolute, to enter a verdict for the amount realised." There is no essential difference between these cases and the present. The effect of the letters to the Sheriff was that they operated as a with-

H. T. 1853.  
*Exch. Cham.*  
 KIRWAN  
 v.  
 JENNINGS.

drawal, until the arrival of another execution. If they amounted to a withdrawal until another comes in, then there is no execution in the hands of the Sheriff. But it is not necessary to refine, for we have a direction laid down in the very same terms in *Pringle v. Isaac*. The letters in that case were remarkably similar to those in the present case; and Richards, C. B., says, "It is quite clear the plaintiff was endeavouring to protect the goods of his brother from time to time; but admitting his intention to have been honest, and not fraudulent, and really what it is stated to be, if we were to permit this sort of delay we should at least be opening a wide door to fraud in all such cases." That case was not put upon the fraud, but upon the abstract rule, that the withdrawal of the writ amounted to a suspension of the execution. He adds, "There could have been no reasonable pretence for not executing the first writ before the return, and it is quite impossible to think that there was any intention to execute it if the other execution had not come in." That case removes every pretence of a distinction; therefore, so far as the case turns upon the effect of the suspension order, it has been virtually a withdrawal of the writ.

But it is said in this case that the money was levied under the execution so first delivered; and in support of that distinction the case of *Thurston v. Mills* is relied on. But when it is said the money was levied under the first execution, that assumes the levy is to be governed by the seizure, and not the sale; but the authorities are quite the other way. In *Drewe v. Lainson*, Lord Denman says:—"By *executing* is meant that he is to apply the proceeds of goods seized in that manner. It is not material whether he seizes the goods under the first or the last writ: as soon as they are seized, they are, in point of law, in his custody, under all the writs which he then has; and when he sells them, he sells in point of law under all the writs." He then seized, having but one writ in his possession, but sold when he had two; he therefore, in point of law, actually sold under the second as well as under the first; and although the priority of time belongs to the first, in point of law it belongs to the second, and the result is that the Sheriff was bound to pay under that writ which was virtually

second in point of time, but first in point of law. That is a complete answer to the case of *Thurston v. Mills*, for there was a levy under a previous execution, and goods were sold to a certain amount, and then came in the execution at the suit of the Crown; and the question was, what was the effect of that execution as to the goods remaining unsold? And the Court held that the Sheriff was bound to sell under the extent; but they left in the hands of the creditor, under whose execution the former sale took place, the proceeds of that sale. This very distinction is taken by Lord Ellenborough; he says:—"There is no case which has determined that a mere seizure will charge the Sheriff in an action for money had and received. There the *fi. fa.* commanded the Sheriff to levy the money off the goods; and until the money was levied under it by sale of the goods, the plaintiff had no interest in it. But the Sheriff never did levy the money under the *fi. fa.*, but only under the *venditioni exponas* authorised by the Court of Exchequer." That distinguishes this case from the present.

H. T. 1853.  
*Exch. Cham.*  
 KIRWAN  
 v.  
 JENNINGS.

Another argument was drawn from that case—that inasmuch as the plaintiff had failed in an action for money had and received, this action could not be maintained; but that case was not decided on the form of the action, but upon the merits; for *Le Blanc, J.*, (p. 277), takes the distinction between that case and one of conflicting writs; for he says:—"This is not like a case where, there being two conflicting writs of *fi. fa.*, the Sheriff has levied, and the question is for the Court to determine under which writ the money was levied; but here the Sheriff, having two executions, applies to the Court to know under which writ he shall execute process, and he is ordered to execute it under a *venditioni exponas*. Then, if it be money had and received to the use of any one, it is money had and received to the use of the Crown, under whose execution the Sheriff was directed by the Court of Exchequer to levy;" showing that this action for money had and received must be maintained by the party entitled to the money.

But it is said that there is no case in which a party has recovered in this form of action. The case of *Swain v. Morland* is decisive on that point. I therefore think that these cases furnish a full

H. T. 1853.  
*Esch. Cham.*  
KIRWAN  
v.  
JENNINGS.

and complete answer to all the objections. Upon the whole, we are of opinion that the judgment given in this case in the Court below ought to be affirmed.

MONAHAN, C. J.

I concur in the judgment of the Court ; but I think there is some little difference between the case of *Kempland v. McCauley*, *Hunt v. Hooper*, and the present case. In *Kempland v. McCauley*, the direction was neither to seize or sell : here the direction was to seize, but not to sell. *Hunt v. Hooper* is in point, so far that the direction was not to sell for a limited time ; but no matter what the difference, the principle is the same ; for the execution, to have operation, must be delivered not for the purpose of seizure alone, but for seizure and levy absolutely.

With respect to the form of action, I am of opinion that money had and received was the proper form. The moment the Sheriff received the money, the party had a right to maintain the action, before the return of the writs ; the case of *Thurston v. Mills* supports that view of the case.

Judgment affirmed.

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E. T. 1852.  
*Common Pleas.*

## SCOTT

v.

MIDLAND GREAT WESTERN RAILWAY COMPANY.\*

(Common Pleas).

April 15, 20.

TROVER, by the plaintiff, as assignee of one Mortimer Kealy, to recover certain goods alleged to be the sole property of the bankrupt.

The case was tried before the LORD CHIEF JUSTICE MONAHAN, at the Sittings after Michaelmas Term 1850, when a verdict was found for the defendant. The case now came on for argument on a bill of exceptions to the charge of the learned Judge. The facts of the case, as they appeared from the bill of exceptions, were as follows:—Mortimer Kealy was declared bankrupt under a commission which issued on the 31st of May 1845. In the year 1846 he again resumed business as a dealer or chapman in Galway, after which time the plaintiff, as he admitted on his examination, had various dealings with him from time to time, in the course of which he had addressed the bankrupt indifferently under the name of Mortimer Kealy and Co., Kealy Brothers and Co., and Kealy Brothers; but, as he alleged, had always considered the bankrupt, from the year 1846, as a sole trader. On the part of the defendant it was insisted that during all this period the bankrupt had traded in partnership with his two brothers, Michael and Thomas. In the latter end of the year 1850, the plaintiff, acting as assignee under the bankruptcy of 1845, seized the stock on the premises of Mortimer Kealy, in the town of Galway; and being apprehensive, as he alleged, that the

The plaintiff, as assignee of a bankrupt, consigned goods to the defendants, a Railway Company, to be forwarded to D., which the agent of the Company undertook to do on the following day; but in the meantime being apprised of an adverse claim to the goods by a third party, refused to do so, unless the plaintiff would furnish them with an indemnity. The plaintiff, having agreed to this, furnished the defendants with a letter, by which he agreed to indemnify them from the consequences of forwarding the goods to D., and that they

should be at liberty to detain the goods until satisfied of the plaintiff's title.—*Held*, in an action of trover, brought against the defendants to recover the goods, that the second agreement was binding on the plaintiff, it being competent for the parties, before the breach of the first, without any new consideration, to have substituted another, and that the plaintiff was therefore bound to prove that he had, before bringing the action, satisfied the defendants as to his title to the goods.

\* The publication of this case has been unavoidably delayed.

E. T. 1852.  
*Common Pleas.*

SCOTT  
v.

MID. GT. W.  
RAILWAY  
COMPANY.

property might be re-taken under a replevin, he applied to the Directors of the Midland Great Western Railway to facilitate him in having the goods forwarded to Dublin; and they, having acceded to his request, furnished him with the following letter, addressed to their superintendent in Galway :—

“2nd August 1851.

“Mr. WEST.—Dear Sir—The bearer, Mr. Scott, wants to get “up about three tons of goods by rail on to-morrow, by the four “o'clock train, will you please give him every facility for doing so. “The directors are anxious that he should be accommodated in this “instance.”—“Yours, truly,  
“P. ROX.”

On the evening of the 2nd of August 1851, the plaintiff left Dublin with this letter, and on his arrival in Galway at 12 o'clock that night waited upon Mr. West, and handed him the letter in question, upon which the latter remarked that it was unusual to forward goods upon Sunday, but that he would of course obey the directions which the letter contained, and thereupon gave directions to have the goods forwarded. The goods were accordingly removed by the plaintiff on the morning of the following day (Sunday), to the terminus of the railway in Galway, and there placed in a van for the purpose of being forwarded to Dublin. In the course of that day, however, West called upon the plaintiff, and informed him that a claim had been made upon the goods by persons named Mortimer, Michael and Thomas Kealy, who alleged that the goods had been wrongfully taken from them, and threatened to commence proceedings against the Company if they should remove the goods, and that under these circumstances he (West) would not forward the goods. The plaintiff replied that the statement of the Kealys was untrue, and that West was bound to forward the goods. After some negotiation it was arranged that West should forward the goods, on receiving a letter of indemnity from the plaintiff, which the latter accordingly gave in the following terms :—

“3rd August 1851.

“SIR.—In consideration of your forwarding to the terminus of “your railway in Dublin 18 packages of goods which I delivered at “your office in this town on this day, I hereby undertake and promise

“to indemnify and hold harmless the Midland Great Western Railway Company, for whom you are acting, and you yourself, from all legal proceedings against you or the said Company, their agents or representatives, for so doing, and which said goods you are to detain in Dublin until the said Company be satisfied that I am entitled to get them.”—“I am your obedient servant,      “DAVID SCOTT.”

E. T. 1852.  
*Common Pleas.*  
SCOTT  
v.  
MID. GT. W.  
RAILWAY  
COMPANY.

The goods were accordingly forwarded upon that day by the Company, and on the following day were demanded at the terminus in Dublin, when the officers of the Company refused to deliver them. The bill of exceptions stated that in about a week after the first refusal, the plaintiff, in company with his solicitor, again called at the office of the Company, when he was informed by their secretary that the Company had been served with a cautionary notice by Mortimer, Michael and Thomas Kealy, who claimed the goods as their property, and that after being referred to the solicitor of the Company, whom the plaintiff and his attorney endeavoured to satisfy as to the title of the plaintiff to the goods, by the production of a case submitted to Counsel, and his answer thereto, the defendants ultimately, both upon that occasion and afterwards, in reply to a more formal demand made upon the 23rd of August 1851, refused to deliver the goods to the plaintiff. At the trial, the LORD CHIEF JUSTICE told the jury that the plaintiff before he brought his action was bound, by the terms of the letter of the 3rd of August 1851, given by him to West, to give the defendants such information and reasonable satisfaction as to his right to the possession of the goods as ought to have satisfied them that he was entitled to get the goods; and that if he had not done so before the commencement of this suit, he was not entitled to maintain this action; and that it lay upon the plaintiff, as a condition precedent to the maintenance of the present action, to give such information to the said defendant; and that if the jury were satisfied that, upon the evidence before them, he had before the commencement of this suit done sufficient to satisfy the said Company to the extent that a reasonable person under the circumstances was entitled to be satisfied, they might find a verdict for the plaintiff, but if not they should find a verdict for the defendant. The learned Judge further stated to the jury that, if they should consider that the



E. T. 1852.  
*Common Pleas.*

SCOTT  
v.

MID. GT. W.  
RAILWAY  
COMPANY.

plaintiff had performed the said condition, a question would then arise as to what portion of the property the plaintiff was entitled to as such assignee; that if they should find that no partnership existed, and that Mortimer Kealy had been the sole owner of the goods, they should find for the plaintiff for the full value of the goods, but if they believed that the alleged partnership existed between the three brothers, that they should find a verdict for the plaintiff, to the amount of one-third of the value of the goods. To this charge the Counsel for the plaintiff excepted, and insisted that the learned Judge should have told the jury that the delivery of the goods, on account of the plaintiff to the defendant, was complete on the night of the 2nd of August 1851, and that the act of defendants in setting up the claim of the Kealys and refusing to forward the goods without an indemnity was evidence of a conversion at that time; that the letter of the 3rd of August 1851 was given without consideration, and was therefore not binding on the plaintiff; and that even if it were, and conferred on the defendants a limited right of possession, such right of possession was determined by the condition specified in the letter having been fulfilled; and further, that even if the plaintiff had not offered to the defendants the proof of his title to the goods which he had, yet as the defendants set up the claim of the Kealys, without reference to the letter of indemnity, and without demanding further satisfaction on the subject, and refused to deliver up the goods when demanded by the plaintiff, as of his original right, any claim which the defendants might have had to a limited possession of the goods was determined.

*Otway*, with whom was *J. D. Fitzgerald*, in support of the exceptions.

The Company were bound, in their character of carriers, to have forwarded the goods, independent of the contract created by the letter of the 2nd of August 1851, and that document did not in any manner affect the position of the parties in point of law. The defendants could not therefore set up the right of the Kealys to the goods when sent to their store in Galway, as against the person from whom they had received them, and consequently there was no

consideration for the letter of indemnity given by the plaintiff to the defendants; and the original liability of the latter, as common carriers, continues undischarged.

E. T. 1852.  
*Common Pleas.*  
SCOTT  
v.

Where there are several joint owners in a chattel, and the chattel is delivered by one of them to a third person, the bailee is bound to return the chattel to the person from whom he has received it, and cannot, in order to defeat his claim, set up the joint right of the other persons to its possession.—[MONAHAN, C. J. Is it not competent for the parties to a contract, before breach of it, to vary the contract in any manner they may agree upon?—The case of *Goss v. Lord Nugent* (a) undoubtedly establishes that position, but the new agreement, like the former, must be founded upon sufficient consideration. Here there would be no consideration for the substituted contract, except an agreement on the part of the defendants to do an act which by law they were bound to do, independent of any agreement.—[MONAHAN, C. J. Would not the Railway Company, if they removed the goods to Dublin on the morning of the 3rd of August, pursuant to their original agreement, have rendered themselves liable to an action of trover at the suit of the Kealys? Might not that circumstance to a certain extent alter the position of the parties, and justify West in requiring an alteration in the terms of the contract? and if you accede to that, can you now object that the substituted agreement is not binding?—JACKSON, J. The new contract requires a consideration, but does it necessarily follow that, where a new agreement is engrafted upon a former one, there must be a new specific consideration for every new ingredient introduced?—In *Stilk v. Myrick* (b) it was decided, in a case where some of the seamen had deserted in the course of the voyage, and the captain, not being able to supply their places, promised to divide the wages which they would have earned amongst the remainder of the crew, that such a promise was without consideration. The following cases were cited: *Harris v. Watson* (c); *Goslin v. Birnie* (d); *Jackson v. Coppin* (e); *Caunce v. Spanton* (f); *Selwyn's N. P.*, p. 41, 10th ed.

MID. GT. W.  
RAILWAY  
COMPANY.

(a) 5 B. & Ad. 58.

(b) 2 Com. Pl. 317.

(c) Peake's N. P. Cas. 72.

(d) 7 Bing. 309.

(e) 8 M. & W. 797.

(f) 7 M. & G. 903.

E. T. 1852. *R. Armstrong and Duggan*, for the defendants, were not called  
*Common Pleas.* on.

SCOTT

v.

MID. GT. W. MONAHAN, C. J.

RAILWAY  
COMPANY.

In this case we do not consider it necessary to call on Counsel for the defendant, as we are clearly of opinion that the exceptions must be overruled. The only one which has been pressed by plaintiff's Counsel is the second; by which it is insisted that I should have told the jury that the letter of indemnity of the 3rd of August was without consideration, and not binding on the plaintiff, and therefore that the jury should put it out of their consideration. The law is clearly settled, as laid down by Lord Denman in the case of *Goss v. Lord Nugent*, in p. 65 of the report in 5th *B. & Adol.*, that after an agreement has been made and reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and then to make a new contract; and it is quite clear that this change in the terms of an original agreement, if fairly obtained, does not require any new consideration. In the present case, it could not be, and has not been, contended that the new agreement contained in the letter of the 3rd of August, if it had been entered into in the first instance, would not have been a perfectly fair and binding agreement to have entered into; and this being so, we are of opinion that it was competent for the parties, without any new consideration, to have substituted it for the original contract, before breach. It was not contended before me at the trial, nor is it insisted by the exception, that the new contract was void, as having been fraudulently or improperly obtained, in consequence of the Company, by their agent, having taken advantage of the situation of the plaintiff, so as to bring this case within the authority of the case of the sailors who insisted on obtaining an increase of wages for doing what they were bound to do under their original contract, which was at the time partly performed; nor was I asked to leave any such question to the jury. It is unnecessary to consider what I should have done if I had been so required, but I

must say I do not think there were any grounds for such a course. E. T. 1852.  
So far from considering that there was any thing unfair or unreasonable in the agreement contained in the letter of the 3rd August, *Common Pleas.*  
it appears to me to have been perfectly fair and reasonable for the SCOTT  
Company, who clearly rendered themselves responsible to the Kealys v.  
by the removal of the goods on the Sunday, if they should turn MID. GT. W.  
out to be the true owners, to require an indemnity from the person RAILWAY  
who, for his own purposes, required such removal; and even if a COMPANY.  
consideration were required to render such change of contract binding, I am by no means satisfied that such consideration would not be found to exist in the change of circumstances which took place at Galway; for though as a general rule, a carrier may be bound to carry goods, if tendered his fare, I am not aware that he is bound to carry goods, in relation to the ownership of which a *bona fide* question is raised, after notice from one of the parties not to do so. It is also unnecessary to consider whether the plaintiff might, if he pleased, have treated what occurred on the morning of the 3rd of August, namely the statement of Mr. West, that he would not forward the goods, as a breach of the previous contract. It is enough to say he did not do so. He did not rest on his rights under such previous contract; but on the contrary, as we think, without any fraud or oppression on the part of the defendants, or their agent, entered into a new or substituted contract, by the terms of which we must hold him bound, and therefore overrule the exceptions.

Exceptions overruled.

E. T. 1853.

Exchequer.

## STEPHENS v. O'BEIRNE.

(Exchequer.)

April 16.

An error in the description of a party in a writ of summons, and copy served, which is not calculated to mislead, is a mere technical one, and as such can be amended under the 3rd section of the Process and Practice Act. Being only an irregularity, and not rendering the writ a nullity, it will be waived by the delay of the defendant, and by suffering the plaintiff to take a step in the cause.

HEMPHILL moved to set aside the writ of summons and all subsequent proceedings in this case, on the ground of a misdescription in the writ, of the residence of the defendant.

The writ of summons was personally served on the 7th of March 1853, to which defendant did not appear. A parliamentary appearance was entered on the 14th of March, and judgment afterwards marked. The defendant's residence was described in the writ of summons as, "St. Helena, Athlone, in the county of Westmeath;" and the defendant had filed an affidavit stating that she knew of no place in the county of Westmeath or near Athlone called St. Helena; but that about three years and a-half before, she lived at St. Helena in the county Roscommon; and that she now resided at Athlone in the county Roscommon. On the 21st of March, the defendant's attorney wrote to the plaintiff's attorney, apprising him of the error; and on the 24th of March served a cautionary notice on him not to proceed further. On the 5th of April, plaintiff served notice stating that judgment would not be marked on the 7th; and defendant replied that her adviser was out of town, and that she expected him back that day. But on the 8th she received notice that judgment had been marked, and that execution would issue forthwith.

The 3rd section of the Process and Practice Act requires the "actual, or supposed, residence" of the party to be stated in the copy of the writ of summons. According to the result of the English cases, to constitute a "supposed" residence, there must actually be some such place as that mentioned in the writ. Here the place mentioned does not exist at all; and therefore the copy of

the writ of summons, not complying with the requisition of the Act, <sup>E. T. 1853.</sup> is a nullity. In England this is made an irregularity by the rule of <sup>Eschequer.</sup> the Judges, but there is no such rule here: *Lewis v. Newton* (a); *King v. Hopkins* (b); *Downes v. Garbutt* (c). <sup>STEPHENS</sup>  
<sup>v.</sup>  
<sup>O'BRIENE.</sup>

*Sydney*, contra, pointed out the difference between the Irish Act and the analogous section of the English. The latter requires the county to be stated in the writ of summons—the former does not. This difference accounts for the English decisions; yet even in England, the omission of a county amounts only to an irregularity. The cases are collected in *Johnstone's New Practice*, p. 9.

The defendant, though personally served with the writ of summons, had suffered the plaintiff to take two steps, viz., the entering of the appearance and filing his declaration, before her cautionary notice; she had, therefore, waived the irregularity, if any it be. But our affidavit states that we supposed the residence stated in the copy of the writ of summons to be the residence of the defendant; therefore we are within the words of the 3rd section: *Rutty v. Arbour* (d)—[PIGOT, C. B., suggested that by the 3rd section the Court had power to amend.]

*Hemphill*, in reply.

That section gives the Court power to amend a technical error in the writ itself; but there is no such power given with respect to the copy, which is not the act of the Court. Misdescription of the residence, however, is not a mere technical error.—[PIGOT, C. B. I am far from saying that it is so, if it be calculated to mislead. It is by no means unimportant that in a large city the description of the party should be correct; and I am not at all disposed to consider the requisitions of the Act as immaterial.]—The Court has no power to amend the copy: *Byfield v. Street* (e); *Nichols v. Boyn* (f); *Eccles v. Cole* (g); *Watkin v. Mealing* (h).

(a) 2 C. M. & R. 732.

(c) 2 D. & L. 941.

(e) 10 Bing. 27.

(g) 8 M. & W. 537.

(b) 2 D. & L. 637.

(d) 2 Dow. P. C. 37.

(f) 10 Bing. 339.

(h) 2 Price, 9.

E. T. 1853.

Pigor, C. B.

*Eschequer.*  
 STEPHENS  
 v.  
 O'SHEENE.

The application is a purely technical one, and founded on the argument that the copy of the writ of summons is a nullity. But on consideration of the Process and Practice Act, and the decisions on the analogous English Act, I think the mistake is only an irregularity, and that it has been waived, under the 244th General Rule, by the delay of the defendant. With reference to the 2nd section, I am disposed to hold the language of it directory, and not mandatory. The language of the English Act is more strict, requiring the county to be inserted, and the Judges, having no power to alter the Act, expounded it by a General Rule, providing that omissions of this nature should amount only to an irregularity. Their exposition therefore is, that the language of the Act is directory, not mandatory. This is a guide, therefore, to our exposition of the Irish Act; and, holding the error in this case to amount merely to an irregularity, we can amend it under the 3rd section, which not only gives us the power to amend technical errors, but goes on to define what shall be considered technical errors, viz., all such errors as are not calculated to mislead. Now this definition applies to the copy as well as to the writ. The error in the copy, therefore, I consider a mere irregularity, which might have been amended, and which has been waived by the delay of the defendant, and her suffering the plaintiff to take two steps in the case.

RICHARDS, B., concurred, thinking that the copy sufficiently complied with the requisitions of the 2nd section.

GREENE, B.

The terms of the notice of motion refer only to the writ of summons, and not to the copy. There is, therefore, no question about the copy; and the 3rd section gives power to amend all technical errors in the writ of summons, and defines what are such. Under that section, therefore, the motion should be refused. But I think the 2nd section is complied with by the insertion of the "supposed" residence of the defendant, which the plaintiff was led to suppose was her residence by his correspondence with the defendant herself.

Motion refused.

H. T. 1853.  
*Queen's Bench*

## SPRATT v. SHERLOCK.

(*Queen's Bench.*)

Jan. 17, 18.

**EJECTMENT** for non-payment of rent, tried before Jackson, J., at the Summer Assizes of 1852, for the county of Cork.

The plaintiff at the trial proved the original lease of the lands, made to one Harmer Spratt, for a term of 999 years, and the probate of the will of Harmer Spratt granted to the plaintiff and Margaret Spratt; and also a lease, bearing date the 10th of June 1825 (the interest in which was sought to be evicted), made between the plaintiff and Margaret Spratt of the one part, and James Ahearne, William Ahearne and Michael Ahearne of the other part, for a term of thirty-one years; that possession was given with the lease; that Margaret Spratt died in 1828; that James Ahearne and William Ahearne died after the execution of the lease, and that Michael Ahearne remained in possession of the lands until 1849, and that the defendant was at present in possession; it was admitted that he derived under Michael Ahearne, and twelve years' rent was claimed to be due under the lease. There was no proof of payment of rent within twenty years.

On this state of facts, Counsel for the defendant called for a nonsuit, no payment of rent having been proved within the last twenty years. The Judge was of opinion that a payment of rent within twenty years ought to have been proved on behalf of the plaintiff, and accordingly nonsuited him, with liberty, if the Court above should be of opinion there ought not to be a nonsuit, that a verdict should be entered for the plaintiff. The jury were discharged without ascertaining the amount of rent due, pursuant to 4 G. 1, c. 5, s. 3.

A lease for years was made by plaintiff and B to three leasees, who were dead at the time of the ejectment being brought. The defendant was in possession of the premises, and derived under the lessee who last died. No payment of rent was proved, nor was there any evidence to connect the defendant with the lease. A nonsuit being called for on the part of the defendant, on the ground that the plaintiff's right of entry was barred by 3 & 4 W. 4, c. 27, the Judge nonsuited, and the jury having been discharged without ascertaining the rent due:—*Held*, that the nonsuit was wrong, because a right of entry accrued with every successive sale of rent.

*Held also*, that, pursuant to 4 G. 1, c. 5, s. 3, the jury ought to have ascertained the amount of rent due.



H. T. 1853.

*Queen's Bench*

SPRATT

v.

SHERLOCK.

A conditional order having been obtained to set aside this non-suit, and that a verdict should be entered for the plaintiff, or for a new trial, pursuant to leave reserved—

*Deasy*, with him *J. S. Greene*, on behalf of the defendant, showed cause.

There is but one question in this case—was the plaintiff barred by the Statute of Limitations from recovering in ejectment the possession of the land, twenty years having elapsed since any acknowledgment of title? At the trial, all that was proved was a lease of 1825, and no proof was given of payment of rent under it. This was not an action for the recovery of rent, but to get possession of the land by virtue of an *habere*. At Common Law it would simply be a right of re-entry, and the Ejectment Statutes were passed to remove the difficulty of that mode of proceeding.—[LEFROY, C. J. Has the landlord not a right at Common Law to re-enter every six months?—We say the right to enter accrues six months from the first breach: 3 & 4 W. 4, c. 27, s. 2, expressly limits the recovery of the land and rent to twenty years from the first accrual of the right.—[CRAMPTON, J. There the entry and the bringing the action are put on the same footing.]—The right of entry to recover the land by virtue of a breach of the condition in the lease accrued on the first breach of that condition. The 3rd section of 3 & 4 W. 4, c. 27, defines the cases to which the 2nd section applies.—[CRAMPTON, J. Has the landlord not a new right every six months?—MOORE, J. The re-entry for condition broken may be waived: suppose a covenant against subletting, and on breach the landlord to have right of re-entry, and yet does not enter, would he not be concluded on a second subletting?—*Doe d. Mannion v. Bingham* (a) decides that where a landlord has received no rent under an existing lease, containing a clause of re-entry for non-payment of the same, for upwards of twenty years, he is barred by the statute 3 & 4 W. 4, c. 27, from recovering in ejectment for non-payment of the rent.—[MOORE, J. That case was decided on the principle that the 2nd section of 3 & 4 W. 4, c. 27, applied to rents reserved by lease as

(a) 3 Ir. Law Rep. 456.

well as to other rents; but I believe other Courts have held differently.]—This Court has certainly, in *Lessee Crosbie v. Sugrue* (a), held, that it does not apply to rent reserved on a demise; and in England the Court of Exchequer have also so decided: *Grant v. Ellis* (b).—[MOORE, J. This is a remedy to recover the rent; and once the Court decide that the 2nd section of the statute does not apply to conventional rents, the remedy must be regulated accordingly.]

H. T. 1853.  
*Queen's Bench*  
 SPRATT  
 v.  
 SHERLOCK.

*J. D. Fitzgerald and Sullivan, contra.*

This question has been settled by the Court in *Crosbie v. Sugrue*, and that followed up by *Lessee Parke v. M'Loughlin* (c); it is not, therefore, open for argument. *Doe d. Mannion v. Bingham* was decided in the Common Pleas before *Grant v. Ellis* was reported, and it is not improbable, if now mooted before that Court, their decision would be in accordance with the later authorities.—[CRAMPTON, J. Certainly it would be a curious state of the law, if after a number of years it was to be held the landlord was entitled to the reversion of the land, and not to the rent incident to the reversion.]—*Daly v. Lord Bloomfield* (d); *De Beavior v. Owen* (e). The 3 & 4 Vic., c. 105, s. 32, which limits the action of debt for rent on an indenture of demise, or covenant, or debt upon any bond or other specialty, to ten years after the end of the then session, or within twenty years after the cause of such actions or suits, but not after, was passed to remove a doubt which existed, whether the 3 & 4 W. 4, c. 27, extended to rents reserved upon an indenture of demise in cases between landlord and tenant.

*J. S. Greene, in reply.*

This case is distinguishable from the case of *Crosbie v. Sugrue*. First, that was a lease in which the rent was under twenty shillings, and so not within the operation of the statute 3 & 4 W. 4, c. 27, s. 9,

(a) 9 Ir. Law Rep. 17.

(b) 9 M. & W. 113.

(c) 1 Ir. Com. Law Rep. 186; S. C. 3 Ir. Jur. 405.

(d) 5 Ir. Law Rep. 65.

(e) 16 M. & W. 547; S. C. in Error, 5 Exch. 166.

H. T. 1853.  
*Queen's Bench*  
 SPRATT  
 v.  
 SHERLOCK.

and secondly, the ejectment was brought by the lessee of a person who had been an infant, within ten years after the removal of his disability; so that the observations of Pennafather, C. J., were extrajudicial. It must be admitted that *Grant v. Ellis* decides that the statute does not apply to an action for the recovery of conventional rent; but the action of ejectment is for the recovery of land.—[LEFROY, C. J. What does the Legislature mean by providing throughout the Ejectment Statutes, that the party bringing his action under them must state upon the face of his declaration that it is an ejectment for non-payment of rent?—That note at foot of the declaration was manifestly for the purpose of informing the tenant of the equitable right of redemption which these same Ejectment Statutes conferred on him, but was not intended to change the nature or ultimate effect of the proceedings, which were by all the Ejectment Statutes declared to be “to recover the possession of the land;” and this same word “recover” is that used in the 2nd section of the 3 & 4 W. 4, c. 27, which treats of “rights of entry.” Can it be doubted that “a right of entry” accrued in this case, when one whole year’s rent was in arrear, and that it first accrued twenty years before the bringing of this ejectment, to recover possession of the land?—[CRAMPTON, J. Suppose an ejectment on a lease of tithes: would your argument apply, there being no lands in question?

*Sullivan.*

It has been decided that tithes are in the same position, and to be treated as land.

*Greene.*

If so, the argument would be equally applicable. The statute only prescribes that a right of entry must accrue.—[MOORE, J. Suppose ten covenants in a lease, and a breach of one covenant giving a right of entry, and no entry made, and then a subsequent breach of the others, must that be referred back to the first breach? If so your argument would apply; but your proceeding is confined to the last right of entry.]—The object of the statute was to quiet titles, and relieve the land from obsolete claims; the intention being that the landlord should be active in enforcing his rights.

The defendant in this case is in a similar position to a tenant from year to year. The case of *Doe v. Bingham* has been recognized in *Sugden on Real Property*, p. 41. It is there said, if a man have a power of re-entering under a lease, upon non-payment of rent, and no payment of rent be made for twenty years, during which time he has not re-entered, he cannot re-enter afterwards, and maintain an ejectment during the lease.

H. T. 1853.  
*Queen's Bench*  
SPRATT  
v.  
SHERLOCK.

However, if the Court are against the defendant on that point, they cannot change the nonsuit into a verdict for the plaintiff, as there was no contingent assessment of the rent, which is expressly required by 4 G. 1, c. 5, s. 3.—[LEFROY, C. J. The difficulty here would be, how to comply with the reservation of having a verdict entered for the plaintiff, as there has been no rent ascertained: there appears to have been an oversight—the statute requires that the jury should find the amount of rent due.—MOORE, J. The objection would be well founded, were it not for the statute which requires the rent claimed to be marked on the back of the ejectment. May not the verdict be entered for the amount claimed as the rent, as if found by the jury?]

*Sullivan.*

The defendant has now no right to take this objection. In *Williams v. Wilcox* (a) Lord Denman says, "In all cases it is the business of Counsel to take care that the Judge's attention is drawn to any objection on which he intends afterwards to rely. If by inadvertence this was not done at the trial, we think we ought not, either upon general principles, or with a view to the particular circumstances of this case, to allow this objection now to prevail."—[CRAMPTON, J. The terms of the reservation at the trial were, in case the Court should be of opinion that there ought not to be a nonsuit, a verdict was to be entered for the plaintiff.]

*Greene.*

The nonsuit was, in fact, taken on the ground that no proof had been given of payment of rent at all. The defendant was not

(a) 8 A. & E. 337.

H. T. 1853.  
*Queen's Bench*  
SPRATT  
v.  
SHERLOCK.

connected with the arrears, and in the case in the note in *Batty's Rep.* p. 79, it was held that the mere fact of a party being in possession, but not connected with the lessee, was no evidence of his holding under the lease. Besides, the facts which caused the non-payment of the rent under the lease are not as yet at all disclosed. There is still a substantial question to be tried, which is sufficiently apparent on the report.

LEFROY, C. J.

It would appear from the report that this case has not been properly tried; it therefore must go down again, for the purpose of deciding the question of right involved in this ejectment. There has been a miscarriage to some extent, on the plaintiff's part, in not having the amount of rent ascertained by the jury, and on the defendant's, in not having the real question at issue tried. Under the circumstances, we think the just rule would be to grant a new trial, on payment of costs by the defendant.

CRAMPTON, J.

I am always desirous that the rules of the Court should be adhered to: there is nothing more dangerous than to allow parties to depart from a solemn engagement, such as that the event of the trial should be decided by what appears on the Judge's report. I adopt the language of Lord Denman: it is the business of Counsel to take care that the Judge's attention is drawn to any objection on which he intends afterwards to rely. I, however, give way to the doubts of the other Members of the Court, especially as there appears to have been some miscarriage; but I wish it to be understood that we do not depart from the rule of the Court, not to look outside the record and Judge's report.

New trial, on payment of costs.

H. T. 1854.  
*Queen's Bench*

## STOPFORD v. EVANS.\*

Jan. 14.

ORMSBY moved that George Harrison and John Evans, who had been substituted as new trustees of the judgment in this cause, by an order of the Master of the Rolls, under the Trustee Act (1850), made in the matter of Robert Evans and others, be appointed conusees of said judgment, and for liberty to issue a writ of revivor, to revive same. The judgment was obtained in Easter Term 1839.

New trustees of a marriage settlement having been appointed by virtue of the Trustee Act, were by order of this Court made conusees of a judgment, part of the settled property, and as such were allowed to issue a writ of revivor to revive said judgment.

*Per Curiam.*

Let said new trustees be, and they are hereby appointed, conusees of the judgment entered in this cause in Easter Term 1839, in the place and stead of William Stopford; and let said George Harrison and John Evans be at liberty to issue a writ of revivor, to revive the judgment in this cause, pursuant to the 151st section of 16 & 17 Vic., c. 113.

## FLEMING v. TAYLOR.

Jan. 21.

FEATHERSTONE, on behalf of the plaintiff, applied for liberty to strike a special jury according to the former practice of the Court. He relied on the 112th section of the Common Law Procedure Act. The affidavit on which he moved stated, as special ground to warrant the application, that the Returning-officers to the Sheriff were attorneys for the defendant. No notice of the application was given.

The Court will grant an absolute order in the first instance for a special jury under the old practice, provided sufficient ground be laid for the application.

The Court granted an absolute order.

\* NOTE.—This, and the following cases in this Term, involving points of Common Law practice under the Procedure Act (16 & 17 Vic., c. 113), are printed in advance of the Term in which they would regularly appear.

H. T. 1854.

Queen's Bench

Jan. 10.

NEILE and WHITE v. SMITH.

Where the conusor of a judgment dies, notice of motion to enter a suggestion, for the purpose of issuing execution against his personal representative, must be given.

DIX, on behalf of the plaintiffs, moved that they be at liberty to enter a suggestion upon the record of the judgment in this cause, to entitle them to issue execution thereon. The affidavit on which he moved stated that the judgment had been obtained by the plaintiffs in Trinity Term 1853; that the conusor died intestate, and his widow had taken out administration to him, and was now his personal representative. The affidavit further stated the sum remaining due on the judgment, for principal, interest and costs, and the application was made to enable the plaintiffs to enter a suggestion that they were entitled to have execution against the administratrix. Counsel referred to the 149th and 150th sections of the Common Law Procedure Act. No notice of the application had been served.

PERRIN, J.\*

I think it safer to serve notice.

Jan. 23.

Dix renewed the application, on an affidavit of personal service of the notice on the administratrix, who did not appear.

*Per Curiam.*†

Let the plaintiffs be at liberty to enter a suggestion upon the record of the judgment in this cause, pursuant to the 150th section of the Common Law Procedure Act, and let the plaintiffs have the costs of this application.

\* *Solus.*† CRAMPTON, J., *solus.*

H. T. 1854.  
*Queen's Bench*

## EDIE v. PHILLIPS and others.

*Jan. 23.*

J. HAMILTON, on behalf of the plaintiff, moved for liberty to enter a suggestion upon the record of the judgment in this cause, and for liberty to issue execution thereon against Patrick Phillips.

On an application for liberty to enter a suggestion upon the record of a judgment, a conditional order only will be granted in the first instance.

The affidavit stated that the judgment was obtained in Easter Term 1842, against Patrick Phillips and John Smith, who had since died; and in consequence of the death of Smith, and the lapse of ten years from the entry of the judgment, this application became necessary, under the Common Law Procedure Act. No notice of the application had been served.

CRAMPTON, J.\*

Let the plaintiff be at liberty to enter a suggestion upon the record of the judgment in this cause, pursuant to the 150th section of said Act; and let the plaintiff have the costs of this motion, unless cause shown within six days after service of the order.†

\* *Solus.*

† NOTE.—Similar applications were made during this Term to the same effect, and conditional orders granted in each case.

## DISNEY v. HAMILTON.

*Jan. 26.*

R. R. WARREN, on behalf of R. A. Disney, one of the assignees of the judgment obtained by the plaintiff in this cause, moved for

Where two of three of the assignees of a judgment had

disclaimed, the Court granted a conditional rule for liberty to the remaining assignee to enter a suggestion on the record, to enable the plaintiff to issue execution on this judgment.



H. T. 1854. liberty to enter a suggestion to entitle R. A. Disney to revive the  
*Queen's Bench* said judgment, and issue execution thereon.

*DISNEY*  
*v.*  
*HAMILTON* The affidavit on which the motion was grounded stated that the judgment had been obtained in 1841, and was assigned in 1848 to three trustees—two of whom, by deed, bearing date January 1854, disclaimed the trusts, and the sum of £100 was due on foot of the judgment.

CRAMPTON, J.\*

Let the said R. A. Disney be at liberty to enter a suggestion upon the record in this cause, in the following terms—that is to say:—"And now, on the 26th day of January 1854, "it is suggested, and manifestly appears to the Court, that "R. A. Disney, as assignee of Thomas Disney (his co- "assignees having disclaimed, by indenture, bearing date "the 19th of January 1854), is entitled to have execution "of the judgment aforesaid against the said A. W. Hamil- "ton; therefore it is considered by the Court that the said "R. A. Disney, as such assignee, ought to have execution "of said judgment against said Hamilton, unless cause "shown to the contrary in six days after service of order."

\* *Solus.*

MARGARET CANTWELL *v.* GEORGE CANNOCK,

And six others.

Jan. 30.

Practice as to  
 settling issues  
 under the Pro-  
 cedure Act.

WHITESIDE (with him *Acheson Henderson*), for the defendants, moved, pursuant to the provision of the Common Law Procedure Amendment Act of Ireland (1853), by way of appeal, that the Court do settle the draft abstract of the pleadings and issues in fact to be tried in this cause, and which were returned by the plaintiff

to the defendants as settled by Mr. Justice MOORE. That abstract, as so stated and settled, recites that Margaret Cantwell the plaintiff has sued George Cannock, John Arnott, Patrick Reid, William M'Nought, James Lombard, Orlando Beaton and Thomas Dudley, the defendants, and demanded £5000 damages for the assault and unlawful imprisonment of the plaintiff by the defendants; and also for the malicious prosecution instituted and carried on by defendants against plaintiff, as in the writ of summons and plaint in this cause mentioned. And further recites that the said defendants have taken defence, and alleged that they did not assault the plaintiff, and did not, without just, reasonable or probable cause, imprison the plaintiff, and did not, without just, reasonable or probable cause, or maliciously, prosecute the plaintiff, in manner and form as in the writ of summons and plaint stated.

H. T. 1854.  
*Queen's Bench*  
 CANTWELL  
 v.  
 CANNOCK.

It then directs the following issues to be tried :—

*First.*—Whether the said defendants, or any and which of them, assaulted the plaintiff and imprisoned her, as in the summons and plaint mentioned; *and if so, whether such assault and imprisonment were respectively lawful or unlawful?*

*Second.*—Whether the said defendants, or any and which of them, prosecuted the said plaintiff, as in said summons and plaint mentioned; *and if so, whether such prosecution was malicious, and without reasonable and probable cause?*

*Third.*—Whether the plaintiff is entitled to any, and what amount of damages, against *all, or any, and which of said defendants*, for the causes of action in said summons and plaint mentioned?

MOORE, J., added to the abstract:—"That in settling the issues "under the recent Act of Parliament, and under the novel and "lengthened pleadings in this cause, I cannot avoid feeling some "apprehension that they may not raise the real question between "the parties. In making the lawfulness or unlawfulness of the "alleged assault and imprisonment, and the existence or want of "probable cause for the prosecution as part of the issue, it may "appear as if a question of law was left to the jury; but I fear "that, without the additions I have made, the fact of an assault,

H. T. 1854. "imprisonment or prosecution, might alone be put in issue." As  
*Queen's Bench*  
 CANTWELL. "the case is one of great importance to the parties, I think that if  
 v. "either party have substantial objections, it would be a fit case to  
 CANNOCK. "take the opinion of the Court upon it."

We object to this abstract: first—the recital in the abstract is insufficient. We desire to have inserted into it a statement, in addition to the charge of assault and unlawful imprisonment of the plaintiff, that it was without any just cause by the defendant Thomas Dudley, as the servant and by the authority of the other defendants, and by the defendant William M'Nought, as the partner and agent of the other defendants; and also that the malicious prosecution was instituted and carried on without any just, reasonable or probable cause. And that to the statement of the defence, there be added a statement that Thomas Dudley and William M'Nought, acting in their said capacities, did not unlawfully, &c., imprison the plaintiff, and that the defendants did not without just cause, &c., maliciously prosecute the plaintiff. And we seek to confine the issues—first, as to whether the defendants, or any and which of them, assaulted the plaintiff, and unlawfully and without any just cause imprisoned her, as alleged in the plaint, and maliciously, and without just, reasonable or probable cause, prosecuted the plaintiff? And secondly, whether the plaintiff is entitled to any and what amount of damages against such defendants or defendant for the causes of action mentioned?

The plaint contains three distinct causes of action, springing, as alleged, out of the same transaction, charging the defendants with assaulting the plaintiff, falsely imprisoning her, and maliciously prosecuting her, without reasonable or probable cause; and the defence traverses the matters alleged: and if the abstract be allowed to remain as at present framed, without these paragraphs we insist on being inserted—the effect would be that the plaintiff might have an action of assault against two of the defendants—of false imprisonment against one, and of malicious prosecution against three.—[CRAMPTON, J. I see great embarrassment in including three different causes of action against different persons, because one verdict

\* The passages in the issues in italics were inserted by Judge MOORE.

may be found against one defendant, and another against another—How then can the record be made up?—LEFROY, C. J. It would come to this, that if they did not prove their case *in omnibus* against all the defendants, they having joined (not as the Act of Parliament directs) several causes of action against different persons, the result would be something like a nonsuit, if such now exist.]—All these difficulties arise from the plaintiff's issues; we seek to have them as the plaintiff states the facts in the plaint, charging that all the defendants did the act.—[CRAMPTON, J. It would be better to put the words "same defendants" in the issues.]—We are content to do so. The 54th section of the Common Law Procedure Act enacts:—"Causes of action, of whatever kind (except in ejectment), may be joined in the same summons and plaint, provided they be by and against the same parties, and in the same rights, except as hereinafter mentioned; but the Court or a Judge shall have power to prevent the trial of different causes together, if such trial would be inexpedient, and to order separate records to be made up, and separate trials had."

H. T. 1854.  
*Queen's Bench*  
CANTWELL  
v.  
CANNOCK.

*Fitzgibbon* (with him *D. C. Heron*), contra.

The Common Law Procedure Act abolishes the general issue, and by the 71st section it provides:—"In actions for wrongs, defences by way of denial shall take issue on some one or more than one material matter of fact alleged in the summons and plaint; and all defences which admit the matter complained of, but rely on matter of avoidance, excuse or justification, shall be so expressly pleaded."

The defence here does not allege justification or excuse, it simply negatives the plaint, and does not allege any new fact.—[CRAMPTON, J. It appears to me that the plaint is prolix; and from the way it is drawn up, and the defence taken, great embarrassment would result at the trial; why will the plaintiff not select one cause of action?]-We are entitled to join several causes of action in our plaint, and we decline to abandon any of them.—[LEFROY, C. J. The Court have under that 54th section power to direct separate records, and unless there be a consent to try the case in the mode suggested by my Bro-

H. T. 1854. ther CRAMPTON, we will exercise the jurisdiction given by the Act.  
*Queen's Bench*  
 CANTWELL  
 v.  
 CANNOCK. It must be understood that the Court has power to deal with prolixity in pleadings under the Act.]—We could not object to the defence, as it is a good issue in fact; but the issues sought to be introduced here by the defendants would enable them to justify a cause of action to which they have not pleaded a justification. That 71st section applies to all actions of tort, and the general issue being taken away, the parties must state as a justification that when the act was committed there was probable cause.—[LEFROY, C. J. There is no such thing as a special plea of justification in an action for malicious prosecution.—CRAMPTON, J. Even now, in an action for a malicious prosecution, a party is not bound to set up a special defence.—LEFROY, C. J. The new law allows you to introduce into one plaint a variety of causes of action against the same parties; but if you join several parties in several causes of action, and there be a failure against one, as to one cause of action, there must be a failure against him as to all. If by this Act a party take advantage of the privilege given him, of joining several causes of action, he must prove the same against all. If a defendant simply traverses an allegation, he cannot give in evidence a special justification. The parties will therefore consider whether they will amend their pleadings or go to trial upon the issues now suggested].

By consent the following issues were adopted :—

*Per Curiam.*

By consent, let the issues in this cause to be tried be but two, as follows :—

First.—Did the defendants, or any of them, assault and imprison the plaintiff, in manner and form ? &c.

Second.—Did the same defendants, maliciously and without reasonable and probable cause, prosecute the plaintiff, in manner and form as in said plaint alleged ?

H. T. 1854.  
*Queen's Bench*

DOWLING *v.* WALLACE.

Feb. 11.

WILLIAM WOODROFFE moved to set aside the defence filed in this cause, on the grounds that it did not traverse any material matter of fact alleged in the plaint, and that it tended to prejudice and embarrass the plaintiff on the trial of this cause; and for the costs of the motion. The plaint was brought by the indorsee against the acceptor of a bill of exchange, and averred the indorsement, acceptance and making of the bill, none of which averments were specially traversed. The defence was in the following form:—"The said W. Wallace appears and takes defence to the said action, and says, that he did not undertake and promise in manner and form aforesaid, as the plaintiff hath above complained, and therefore he defends the action."

A defence set aside as amounting to the general issue.

No Counsel appeared to oppose the motion.

CRAMPTON, J.—Take the order.

M'CAY *v.* MAGILL.

Feb. 17.

HUTTON moved that the plaintiff or his attorney might be at liberty to inspect, and, if necessary, take a copy of all letters in the custody or under the control of the defendant, written by the firm of Boyle and Co., of New Orleans, and dated April 1853, and addressed to the defendant, containing directions or instructions the law then in force. An affidavit detailing such facts as would sustain a bill of discovery prior to the passing of 14 & 15 Vic., c. 99 (Evidence Act), will entitle the applicant to inspect the documents referred to in the affidavit.

Where an action had been commenced prior to the passing of the Common Law Procedure Act, it may be continued under

H. T. 1854.  
*Queen's Bench*

M'CAY  
 v.

MAGILL.

to the defendant, in reference to the payment of a sum of £400, due and owing by the said firm to the plaintiff, or to any remittance of money by the said firm to the defendant, for the plaintiff's account; and also, that the defendant might be at liberty to inspect all entries in the defendant's books of account, relating to a bill of exchange for £900, or to the discount and proceeds thereof, and all copies of letters addressed by the defendant to Boyle and Co., in the year 1853, in relation to the said bill of exchange. He moved, on the affidavit of the plaintiff, in which it was alleged that the firm of Boyle and Co. were indebted to the plaintiff in the sum of £400, for the payment of which the firm had transmitted a bill of exchange to defendant, with directions to pay thereout the debt due to the plaintiff, and that the defendant had undertaken to pay the amount. It further stated that the defendant had received the bill and had discounted it, and that the plaintiff had grounds for believing that there were entries in the defendant's books in reference to it, and that it would be material for the plaintiff to inspect them previous to the trial. The 6th section of 14 & 15 Vic., c. 99 (Evidence Act), gives the Court power to make this order in all cases in which a bill of discovery would lie; on this state of facts, the Court will grant the application: *Gilsworthy v. Norman* (a).

*Harrison, contra.*

This motion is irregular, no preliminary notice having been served, calling for the production and inspection of the documents required. By the 64th section of the Common Law Procedure Act, extending the provisions of 14 & 15 Vic., c. 99, such a notice is required before an application to the Court is made, and this Act ought to regulate the course of procedure in applications like the present.

MOORE, J.

As this action has been commenced before the passing of the Common Law Procedure Act, I do not think it is essential that

(a) 21 Law Jour. N. S., Q. B. 70.

the preliminary notice required by that Act should be served; the party was at liberty to proceed under the former statute.

H. T. 1854.  
*Queen's Bench*

M'CAY  
v.  
MAGILL.

*Harrison.*

The affidavit is defective, in not setting out more fully the defendant's letter to the plaintiff, undertaking to pay him his debt out of the proceeds of the bill. The action cannot be sustained against the defendant, for want of privity of contract, unless this letter were precise and unequivocal. The letter should have been set out at length in the affidavit, that the Court might judge of its effect; but even if the Court think that the plaintiff is entitled to inspect the letters and books, it would equally answer his purpose, if copies were furnished to him.

MOORE, J.

I conceive a sufficient case has been made out on the affidavit to entitle the plaintiff to the relief sought. Before the passing of 14 & 15 Vic., c. 99, a bill of discovery would have lain in such a case, and therefore I think the plaintiff is entitled to see the documents. It will however be sufficient, if certified copies of the documents be furnished. I will therefore make an order, that the defendant do, within ten days, furnish to the plaintiff copies of the several documents mentioned in the notice of motion, accompanied with an affidavit that the copies served are correct copies; the plaintiff to be at liberty to apply to the Court in case the documents furnished be unsatisfactory.

*Harrison* applied for the costs of the motion, relying on *Pepper v. Chambers (a)*.

MOORE, J.—Let the costs of this motion be costs in the cause.



H. T. 1854.  
*Queen's Bench*

VANDELEUR v. SMITH.\*

Feb. 24.

The 31st section of the Common Law Procedure Act applies to actions of ejectment, and the provisions of it are mandatory, and service of the writ will not be held good, where the indorsement on the writ is not made within the time limited by that section.

J. S. ARMSTRONG, on behalf of the plaintiff, moved that the service had of the ejectment in this cause be deemed good service, notwithstanding the informality in the indorsement of such service. An order had been obtained to substitute service of the plaint in this cause on the defendant, who was resident out of the jurisdiction, by serving his brother, resident in the county of Clare. The process-server had served the plaint pursuant to this order, on the defendant's brother, on the 18th of February, and the indorsement of such service of the writ was made on the 21st of February. By the 31st section of the Common Law Procedure Act, the process-server is required on the day of such service, or at latest on the day next after, to indorse on the writ the place and day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of no appearance and defence, to proceed under this Act, and every affidavit of service of such writ shall mention the day on which such indorsement was made. The 195th section directs that the writ of ejectment shall be dated and indorsed, and continue in force, and be renewed, and shall be filed after the service thereof, in like manner as hereinbefore enacted with reference to the writ of summons and plaint in a personal action. This application consequently becomes necessary, as, in case of no defence being taken, a parliamentary appearance cannot be entered, and the Court has power under the 16th section to make this order, this being a technical error, and one which cannot mislead the defendant, inasmuch as a letter has been received from the defendant, acknowledging the receipt of the order to substitute.

*Todd*, who had a similar application in another cause, submitted

\* In Chamber, before GREENE, B.

that the 31st section did not apply to ejectments, the indorsements therein directed being applicable only to those required by the 11th and 12th sections, which did not apply to ejectment causes.

II. T. 1854.  
*Queen's Bench*  
VANDELEUR  
v.  
SMITH.

GREENE, B.

I think the 31st section applicable to ejectments, and that I have no power to grant the application, as I take that section to be mandatory, in consequence of the alternative provision disabling the plaintiff from entering a parliamentary appearance, unless the provisions of the section be pursued.

#### HARRINGTON v. COXE.

E. T. 1853.  
*April 25.*

M'MAHON, on behalf of the plaintiff in this case, applied for liberty to issue execution on foot of a judgment of Hilary Term 1853. The affidavit on which he moved stated that the plaintiff had obtained a judgment in Hilary Term against the defendant, for the penal sum of £200, and that same was had upon a certain writing obligatory, dated 13th December 1850, whereby the defendant became bound in the said sum, but under a condition annexed, that if the defendant or his heirs, executors, &c., would well and truly pay, or cause to be paid to the deponent, her executors, &c., the sum of £100 with interest, at the time and in the manner set forth in the defeazance, in a certain warrant of attorney thereto annexed, without fraud or further delay, then the obligation to be void, otherwise to remain in full force. The affidavit further stated that the warrant of attorney therein mentioned, of even date therewith, authorised E. D. and T. M., attorneys, or any other attorney, to confess judgment against the defendant at suit of plaintiff, in or as of Michaelmas Term, or any Term subsequent to the date thereof, in any of Her Majesty's Courts of Record at Dublin, and that the time and manner of payment of

A bond conditioned for payment of £200, subject to a proviso that if the obligor or his heirs, &c., should pay to the obligee £100 at the times mentioned in a defeazance, in a warrant of attorney, thereto annexed, without delay, the obligation to be void, otherwise to remain in force. The times and manner of payment specified in the defeazance were that the £100 should be paid by instalments of £10 on the 29th December following the date of the bond, and £10 on the 29th of every succeeding four months, and if default were made, the obligee was to proceed for whatever sum remained due. *Held*, that execution could not issue on such bond without a suggestion of breaches.

bond, and £10 on the 29th of every succeeding four months, and if default were made, the obligee was to proceed for whatever sum remained due. *Held*, that execution could not issue on such bond without a suggestion of breaches.

E. T. 1853. said £100 in the defeazance in said warrant, and previous to the execution of the bond and warrant agreed on, were as follows, viz:—  
*Queen's Bench.*  
 HARRINGTON v. COKE.  
 the said principal sum of £100 should be paid by instalments; the sum of £10 on the 29th of December next following the date of the bond, and a like sum of £10 on the 29th of each succeeding four calendar months, from the said 29th December 1850, until the said £100 were paid off; and until default be made in any of the said payments, no judgment should be entered on said warrant, but in case of such default, deponent should be at liberty to proceed thereon for whatever sum remained due. The affidavit then stated that two instalments of £10 each were paid when they became due, but that no subsequent instalments were paid, although six of them were due on the 29th of December, and that there remained due a sum of £80 for principal and costs.

*M'Mahon* cited, in support of the motion, *Rigley and another v. Birch* (a); *Stratton v. Codd* (b); *Tilby v. Best* (c).

LEFROY, C. J.

This is a case for a suggestion of breaches; here is a collateral instrument modifying the penalty, and it is not altered by any thing in the proviso. We say—

No rule.

(a) 4 Ir. Law Rep. 14.

(b) 9 Ir. Law Rep. 1.

(c) 16 East, 163.

#### THE QUEEN v. DUFFY.

April 29.

An indictment for libel having been found by the grand jury in the Court of Queen's Bench, the traverser pleaded in abatement, first, that M. J., that two of the grand jurors were, at the time of their being summoned and serving on the jury, beyond the age of sixty years, and that another juror was not resident in the county of the city of Dublin. *Held*, that the Jury Act, 3 & 4 W. 4, c. 91, does not apply to Term grand juries in the Queen's Bench, and that therefore such pleas were bad.

*Held also*, that the objection as to age was ground of exemption, not of disqualification.

one of the jurors by whom the said alleged indictment was found a true bill, was at the several times of his being summoned on the grand jury, and of his being sworn on the grand jury, and of his finding the said bill a true bill, beyond the age of sixty years, to wit, of the age of sixty-one years. Secondly, that L. D., another of the jurors, &c., was beyond the age of sixty years. Thirdly, that S. F., another of the jurors by whom the said supposed bill of indictment was found a true bill as aforesaid, was not at the time of his being summoned on the grand jury resident within the county of the city of Dublin. The pleas were verified by affidavit. The Crown demurred to the several pleas, and the demurrer was now argued by—

E. T. 1853.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**DUFFY.**

*O'Driscoll* and *Lynch*, for the prosecutor.

These pleas are bad in form and substance: in form, because the matters alleged might have been pleaded in one plea, instead of pleading double. Pleas which are triable in different ways are bad for duplicity: *Kirwan's case* (a).

The pleas are bad in substance, because if pointed to the age of the jurors as a ground of objection, that objection does not apply to grand jurors; such an exemption only applies to jurors summoned for the trial of issues. The first statute on the subject is that of Westminster, 13 *Edw.* 1, c. 38, which ordained "That from henceforth, in one assize, no more shall be summoned than four-and-twenty; and old men above three score-and-ten years, being continually sick, and being diseased at the time of the summons, or not dwelling in that county, shall not be put on juries or petit assizes, nor shall any be put in assizes or juries—though they ought to be taken in their own shire—that may dispend less than twenty shillings yearly." And it is expressly said, "neither shall this statute extend to great assizes." It is plain it did not extend to grand juries. Then comes 21 *Edw.* 1, c. 1, which is not material to the present question, but which has reference to the qualification of freehold in connection with persons sitting as jurors. The 6 *G.* 4, c. 50, s. 1 (*Eng.*), is identical with 3 & 4 *W.* 4, c. 91, the statute

(a) 31 St. Tr. 576.

E. T. 1853. applicable to Ireland in the regulation of juries. Exemption is not disqualification, and even in the case of petty jurors, age is only ground of exemption: *The Queen v. O'Connell* (a). There Mr. DUFFY.

*Queen's Bench*  
THE QUEEN  
v.

DUFFY.

Roper, though above sixty years old, was sworn on the jury, though he claimed to be exempt, the Court considering he should have had his name struck out of the jurors' book at the proper time. The 3 & 4 W. 4, c. 91, s. 1, enacts "That every man, except as herein-  
"after excepted, between the ages of twenty-one years and sixty  
"years, residing in any county in Ireland, who shall have in his  
"own name or in trust for him, within the same county, £10 by  
"the year above reprises in land, &c., or in rents, &c., and also  
"every resident merchant, freeman and householder, having a house  
"and tenements in any city, &c., shall be qualified with respect to  
"property, and shall be liable to serve on juries for the trial of all  
"issues joined in any of the King's Courts of Record in Dublin,  
"and in all Courts of Assize, Nisi Prius, Oyer and Terminer and  
"Gaol Delivery, such issues being respectively triable in the county  
"in which every man so qualified respectively shall reside; and  
"shall also be qualified with respect to property, and liable to serve  
"on grand juries in Courts of Sessions of the Peace, and on petty  
"juries for the trial of all issues joined in such Courts of Sessions  
"of the Peace," &c. Clearly, therefore, grand juries at Sessions do not include Assize and Term grand juries.

As to the third plea: *Regina v. Duffy* (b) meets the objection raised by it. The objection there was larger, negating the entire qualification of the juror; here it but negatives the fact of residence; it should have denied that he was a fit and proper person to act as juror.

*J. O'Hagan and T. O'Hagan, contra.*

*Kirwan's case* and *The Queen v. Duffy* establish that several pleas in abatement may be pleaded, if the same kind of trial be applicable to each; and it cannot be argued here that the matter pleaded involves different modes of trial. At Common Law, we admit, we could not plead the objections we have raised; but what

(a) *Arms. & Tr. Rep.* 48.

(b) 1 *Ir. Jur.* 90.

we allege is, that 3 & 4 *W.* 4, c. 91, applies to grand juries generally. The Sheriff ought not, in obedience to a precept or *venire facias*, return any juror not qualified, for the absence of such qualification amounts to a disqualification of all persons so prohibited to be returned. Secondly, that prohibition to the Sheriff extends to grand jurors as well as petty jurors, and to Superior Courts as well as Inferior Courts. Thirdly, persons over sixty years, and not resident, are disqualified as jurors. Fourthly, if any one juror be disqualified, the indictment found by that grand jury must fall to the ground. It may be objected to the first position, that the Statute of Westminster provided against putting jurors on the panel who should not be there; but the present Jury Act deals with qualification, and that only. The Statute of Westminster created an exemption, and the subsequent statutes treated that exemption as a disqualification: The 35 *Hen.* 8, c. 6, s. 3 (*Eng.*), gave a form of *venire*, and it was held that under that statute want of qualification was good cause of challenge. That statute directed the Sheriff also to return six hundredors, and a want of these was also ground of challenge. So 27 *Eliz.*, c. 6, s. 5, enacted that no further challenge for the hundred shall be admitted, if two sufficient hundredors do appear at and upon the trial of the issue: thus showing that non-compliance with the provisions of the previous statute amounted to a good cause of challenge.

E. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 DUFFY.

As to the second position: the word "juror," *ex vi termini*, includes grand as well as petty jurors: *Bac. Abr., Juries, A.* There is no limitation in the statute on the term "jurors;" it is general and unrestricted: *In re Nowlan (a)*. When the Legislature created an exception to the qualification, it expressed it.

Thirdly, persons over sixty years of age are disqualified from serving; this appears expressly from the 1st section of 3 & 4 *W.* 4, c. 91, obliging every one to serve between twenty-one and sixty years of age. The 20th section enacts that want of qualification in jurors shall be cause of challenge—so non-residence is ground of challenge: *The Queen v. O'Doherty (b)*. But it is said that age and non-residence are ground of exemption, and not of disqualifi-

(a) 2 *Ir. Law Rep.* 7.

(b) *Hodges' Rep.* 526.

E. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 DUFFY.

cation, and Mr. Roper's case was relied on; but there neither party objected to Mr. Roper serving: here we say the matter pleaded is both disqualification and exemption. The disqualification of a grand juror is a good plea in abatement: *Kirwan's case* (a); 3 *Inst.*, p. 33.—[MOORE, J. Mr. Roper's case is no authority for your position, for the Court had no means of knowing the truth of the fact.—PERRIN, J. How do you read the 1st section of 3 & 4 *W.* 4, c. 91?—CRAMPTON, J. The Sheriff is bound not to return any one disqualified under the Act; you must show that Act applies to grand juries in this Court.]—It applies to all juries, for the 32nd section says, "that if any man having been duly summoned to attend on any kind of jury in any of the Courts in this Act mentioned," &c.

*Lynch* replied, and was stopped by the Court.

LEFROY, C. J.

The question is, simply, does 3 & 4 *W.* 4, c. 91, apply to grand juries at all, or to grand juries in this Court? The 1st section applies to grand juries of certain Courts, and though the language of the first part of that section might imply that all grand juries are included in it, yet the subsequent part of the section contains an express provision relating to certain Courts, viz., Courts of Record in Dublin, and Courts of Assize, Nisi Prius, Oyer and Terminer and Gaol Delivery. How is it possible for us to hold that the former part of the section can take away that express enactment in the latter part? On that ground, that we cannot extend the operation of the Act so as to apply it to grand juries in this Court, we hold the demurrers must be ruled with the Crown. There is no doubt as to the distinction between exemption and qualification.

CRAMPTON, J.

The qualification, as applied to this Act, means qualification as to property, and there is a clear distinction in the Act between qualification and exemption. The Act but applies to the grand juries specially referred to.

(a) 31 St. Tr. 574.

PERREN, J.

The qualification in the Act is clearly a property qualification, and there is a distinction between qualification and a liability to serve on the jury. A juror may take advantage of his non-liability, but it is no ground of challenge.

MOORE, J., concurred.

E. T. 1853.

*Queen's Bench*

THE QUEEN

v.

DUFFY.

COATESWORTH and others v WALSH.

April 25, '29,

May 4.

INDEBITATUS assumpsit, by the plaintiffs, ship-brokers at Liverpool, to recover a sum of £45. 19s. 0d., paid under protest to the defendant as receiver of droits at Dublin. The defendant pleaded the general issue, and gave a notice of set-off of £96. 8s. 8d., being for fees and disbursements due by the owner of a ship called the *Guardian*, to the defendant, as Lloyds' agent, a capacity he also filled at the port of Dublin.

The case was tried before CRAMPTON, J., at the Sittings after Hilary Term, and the following facts appeared in evidence:—The ship *Guardian*, on a voyage from Liverpool to this port, on the 9th of September 1852, ran ashore off Malahide, near Dublin, and the defendant, on receiving intimation thereof, proceeded to the vessel, and made arrangements with the captain for the procuring of assistance to get the vessel off the bank. He accordingly em-

A ship having been stranded on a bank near D., A, as receiver of droits, and also acting as Lloyds' agent, assisted in getting the vessel off the bank, and employed tug-boats and men for that purpose: to enable the vessel to be moved, a portion of her cargo was placed on board a tug-boat, and conveyed to D. On the arrival of the goods at D., A de-

tained them under a claim for salvage, and also until he was paid fees claimed by him as receiver of droits, for the time the goods were in his custody, which fees, B, as agent for the shippers, paid under protest.—*Held*, that an action was maintainable by B, to recover back the money so paid, he having been dealt with by A as principal, and having paid the money out of his own pocket.

*Held also*, that as receiver of droits, A was not entitled to the fees claimed, such fees being only payable to him for his services while employed in saving the vessel, and could only be claimed as against the owners of the vessel, and that he had no lien on the goods for them.

*Held also*, that A was entitled to set-off for his services and expenses incurred by him as a salvager, under the statute 9 & 10 Vic., c. 99.



E. T. 1853.

*Queen's Bench*COATES-  
WORTH

v.

WALSH.

ployed two steam tugs and a number of the coast-guard, and other persons. A flat was brought from Dublin to receive the cargo, and about a hundred packages were on the 10th of September put on board this flat, in order to lighten the cargo and get the vessel off the bank. The plaintiffs, in the meantime, had sent from Liverpool a person named Brissett, as their agent, and he required the captain of the vessel to act under his orders. The plaintiffs, it appeared, were guided by the directions of a Mr. Chadwick, the owner of the ship, and their proceedings were adopted by him. The captain, having communicated with the Dublin agents of the plaintiffs, requested the defendant not further to interfere; and the defendant having, in his capacity of receiver of droits, held an examination as to the circumstances connected with the stranding of the ship, left the vessel, which was shortly after brought to Liverpool. The hundred packages put on board the flat were brought to Dublin; and on the 14th of September, claims for remuneration for services rendered were made upon the defendant, in his capacity of receiver of droits, by the several persons he had employed; and he thereupon requested the Dublin agents of the plaintiffs not to permit the goods to be removed until these claims were satisfied; and they having declined to accede to this proposal, officers were put in charge of the goods, and by the orders of the defendant they were deposited in the Custom-house stores. Subsequently the defendant, by the orders of Chadwick, the owner of the vessel, paid several sums of money to the coast-guard, and other persons employed in rendering assistance to the ship, for which, and his own personal expenses, he claimed £96. 8s. 8d. The salvage claims of the steam tugs was adjudicated on by the magistrates, on the 30th of September, to the amount of £150. The Dublin agents of the plaintiffs thereupon offered defendant £38. 2s. 6d. in respect of his actual disbursements, and a deposit of £300 in lieu of bail, pending a threatened appeal by the tug owners, in case the goods were delivered up; but the defendant, under colour of his office as receiver of droits, detained them. Ultimately, the Dublin agents of the plaintiffs, on the 26th of October, paid the sum awarded to the steam tugs, and paid the defendant the sum demanded for his fees as receiver of droits,

amounting to £70. 11s., accompanying it with a protest that it was paid but to obtain the goods. In this sum was included £45s. 19s., the subject of the present action, which the plaintiffs disputed the right of the defendant to receive. The items of this sum were a charge of £2. 2s. for the first day, and £1. 1s. for every subsequent day that the goods brought from Malahide in the "flat" were in the custody of the defendant as receiver of droits. The vessel and cargo admittedly were above the value of £600. It was insisted on the trial that the defendant was entitled to the fees claimed by him as receiver of droits; secondly, that the plaintiffs had shown no interest in the goods, and had no right to maintain the action; thirdly, that if the plaintiffs were entitled to maintain the action, that right must be subject to the same right of set-off which the defendant would have had if Chadwick (the owner) had brought the action.

E. T. 1853.  
*Queen's Bench* .  
 COATES-  
 WORTH  
 v  
 WALSH.

The Judge, on consent of the parties, directed a verdict for the plaintiffs for £45. 9s. 0d., subject to be turned into a verdict for the defendant, in case the Court should rule with him on any of these points. A rule *nisi* having been obtained accordingly, cause was now shown by—

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NOTE.—9 & 10 Vic., c. 99. An Act for consolidating and amending the laws relating to wreck and salvage. Section 10 enacts:—"That every person (except receivers under this Act), who shall act or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, or of any goods, jetsam, flotsam, lagan, or derelict, or of any anchors, cables, tackle, stores or materials which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise, and whether such person shall have so acted at the request of, or on application by any person in authority, or by the master or owner of any ship or vessel, or otherwise, shall, within fourteen days after the owner or any other person shall have established his claim to any such article as aforesaid, be paid a reasonable reward or compensation by way of salvage for such service, by the commander, master or other superior officer, mariners or owner of the said ship or vessel, or their agent, or by the merchant whose ship, vessel or cargo shall be so saved as aforesaid, or by the owner of the other articles hereinbefore mentioned, or other person claiming the same; and in default thereof, the said ship or vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, shall remain in the custody of the High Court of Admiralty, and the said goods or other articles (and also until warrant issued from the High Court of Admiralty), the said ship, vessel or cargo shall remain in the custody of the receiver or officer of the customs until the person

E. T. 1853.  
*Queen's Bench*

COATES-  
WORTH  
v.  
WALSH.

*Maddenogh, Fitzgibbon and Gibbon.*

The claim in question is founded on the 19th section of the statute 9 & 10 Vic., c. 99, and by virtue of that section the defendant detained these goods. Having claimed for services from the 11th to the 30th of September, on which day the magistrates made their award as to the salvage claim, he was paid £45. 19s. under protest, that being £2 for the first day, and £1 for each succeeding day. He had no right to be paid that sum. It will be contended that the plaintiffs, who paid that money through their agents, have no right to have it restored, as they are not the owners of the ship, and yet it was proved the money belonged to the plaintiffs, the shippers of the goods. Then after the action was brought, a claim of set-off was made by the defendant for work done as Lloyds' agent, to an amount of £52. 10s. 0d., for several services in that capacity, except one fee of £1 for an affidavit as receiver of droits. This claim is unsustainable, because in a letter of the defendant, of the 15th of December 1852, to Chadwick the owner of the ship, and in another to the plaintiffs, it is expressly stated he will look to Chadwick and not to the plaintiffs. This claim is not made by him as receiver of droits; and is he then, because salvors make claims, to retain the goods until these claims be satisfied? That would be giving him payment for seizing goods which were at the time lodged in the Custom-house stores. The person liable to the payment was the owner, and the proper medium of enforcing the charge was the detention of the vessel, not the goods. The proviso in that 19th section is conclusive against the defendant.

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so acting or employed in the preservation of such ship or vessel, goods, or other article as aforesaid, shall have been reasonably compensated for his said assistance and trouble, or reasonable security given for that purpose, to the satisfaction of the said receiver or officer of the customs, or High Court of Admiralty: provided always, that every receiver who shall act or be employed in the saving or preserving of any ship or vessel in distress, which shall not become a droit of Admiralty, shall be entitled to receive from the owner thereof the sum of £2 for the first day, and the further sum of £1 for every subsequent day on which he shall be employed in the said service; if the said ship or vessel, together with the cargo thereof, shall be of, or above, the value of £600; and the said receiver shall be entitled to a moiety of such respective sums, if the said ship and cargo shall be under the value of £600; and the said ship or vessel shall be so detained as aforesaid, until such sums shall have been paid to the said receiver."

There was no privity in respect of the subject-matter of the set-off between the plaintiffs and defendant; the claim was one in its nature which would arise against the owners of the vessel alone. The plaintiffs merely represented the owners of the goods, and there was no contract between them and the defendant. If a public officer seize goods and detain them until he be paid his claims, the party paying such—if the claim be illegal—may maintain *indebitatus assumpsit* for money had and received, even though he had no connection with the goods.—[CRAMPTON, J. The question is, had the receiver of droits a right to the fees claimed here?]

E. T. 1853.  
Queen's Bench  
COATES-  
WORTH  
v.  
WALSH.

*Hayes and Chatterton*, for the defendant.

That 19th section of the Salvage Act entitles the defendant to the fees in question. He was bound to see all persons properly compensated, and his duties regarding the cargo did not cease until that compensation was made. That Act of 9 & 10 Vic., c. 99, appoints a new class of officers and provides for their remuneration; and the 21st section enacts, that if the owners and salvors disagree respecting salvage, when the claim shall not exceed £200, two justices or an umpire may determine the same. The 23rd section contemplates that, until that adjudication be made, the goods shall remain in custody of the receiver of droits, and it is in that capacity the defendant is entitled to these fees. If the plaintiffs' construction be the right one, no matter what services the receiver of droits may render, he is to receive but £2 for the first day, and £1 for every succeeding day that he is actually employed in salvage services in superintending or rescuing goods. His duty continues until every claim of salvage is disposed of. The defendant would have no right to accept bail for the goods until an appeal was lodged, or until the time had elapsed for lodging the appeal.

But assuming that he is not entitled to these demands as receiver of droits, he is entitled to a set-off against the principals, whom the plaintiffs represent in this action; for the plaintiffs are neither owners of the ship or cargo, but shippers of the cargo only. They sue as the representatives of all who are interested in this action; and clearly, then, the defendant has a right of set-off against

E. T. 1853. them—[PERRIN, J. The plaintiffs are *quasi* owners of the goods—the  
*Queen's Bench* liabilities to the defendant, as Lloyds' agent, are the liabilities of the  
 COATES- vessel and cargo.]—The plaintiffs were the agents for the ship as  
 WORTH well for the owners of the cargo—the goods were to be released  
 v. for the benefit of the ship and cargo, and the set-off is for services  
 WALSH. to both ship and cargo. If the goods had been thrown overboard  
 to save the ship, the owners of the goods would have been entitled  
 to average on the ship, the freight and the remaining goods. The  
 action being brought by persons representing the ship and cargo,  
 the set-off is for services rendered to both: *Warner v. M'Kay* (a);  
*George v. Clagett* (b); *Rabone v. Williams* (c); *Coppin v. Craig* (d).  
 These cases show that if a party deal with an agent as a principal,  
 and that party be subsequently sued by the principal, he may set  
 off a debt due to him by the agent: *Carr v. Hinchliffe* (e).

*Fitzgibbon* replied, and cited, as to the maintenance of the action,  
*Stephenson v. Mortimer* (f); *Story on Agency*, p. 500 (2nd ed.);  
 and as to the set-off, *Fish v. Kempton* (g).

*Cur. ad. vult.*

LEFROY, C. J.

May 4.

This case comes before the Court on points saved. The  
 first point is, was this action maintainable by the plaintiffs to  
 recover money, paid under protest, in order to release goods seized  
 by the receiver of droits, he insisting that he was entitled to retain  
 them for fees due to him in that capacity? It appears that  
 the ship, with goods on board, was stranded; and the defendant, as  
 receiver of droits, went on board and remained there, acting as such  
 for two days, for which period he claims no fees, the subject-matter  
 of this action; but having collected men, and paid them money to  
 assist in getting off the vessel and saving it, he contends he is in  
 respect of that disbursement entitled to payment, so that even

(a) 1 M. & W. 591.

(c) *Ibid.* in note, 360.

(e) 4 B. & C. 547.

(b) 7 T. R. 359.

(d) 7 Taunt. 243.

(f) Cowp. 805.

(g) 7 C. B. 687.

though he should fail in establishing the right to detain the goods as for a lien, as receiver of droits, he at all events is entitled to the benefit of the set-off, being for fees, salvage, and disbursements made for the protection of the goods and vessel.

E. T. 1853.  
*Queen's Bench*  
COATES-  
WORTH  
v.  
WALSH.

Was he entitled to the fees? We are of opinion he was not; but, supposing he established his right to fees, it is clear his right to recover them would only be against the owner of the ship: that is plain from the 19th section of the Salvage Act.

He had no right of lien on the goods. But though he had no right to retain them for any demand of his own, as receiver of droits, under the 19th section, he would have a right to keep them for the payment of the salvage expenses, and even to sell them. By the 14th section there is particular duty cast upon him, of a different description from that adverted to in the 19th section: for by that section, receivers of droits, when any vessel or ship shall be in distress, are empowered to summon men or procure ships to assist them, and although the 19th section excludes the defendant as a salvagor, it does not deprive him of the disbursements he made in this way. We therefore think he has a right to be reimbursed the moneys expended by him, pursuant to the terms of the 14th section; and that he is entitled to have a verdict entered for him upon the set-off, but not for his claim as receiver of droits.

CRAMPTON, J.

Three questions have been raised in this case:—First, was this action maintainable by the plaintiffs?—Secondly, is the defendant, as receiver of droits, entitled under the statute to the fees he claims? and thirdly, is he entitled to the set-off?

As to the first question, it was contended that the action should have been brought by the owners of the vessel. The plaintiffs, however, were the agents of the owners, and also the agents of the shippers, and they had a right to the custody of the goods; and in order to release them, when detained by the defendant, they paid his demand out of their own money, and got them again into their possession, and re-shipped them. Having thus dealt as principals, it is clear they are entitled to maintain this action.

E. T. 1853.  
*Queen's Bench*  
COATES-  
WORTH  
v.  
WALSH.

Secondly, whether the defendant, as receiver of droits, was entitled to the fees he claimed under the 19th section of the statute. He has put forward two claims, one as a salvager, the other as receiver of droits. It appears that, on the 10th of September, he went on board the vessel. On that day he acted only as the agent of Lloyds', and gave up the possession of the goods to the agents of the plaintiffs: there was then an end of the salvage. The goods being in the possession of the plaintiffs, as owners, a vessel was hired and the goods were brought to the Custom-house docks, and there the defendant seized them as receiver of droits; and, as such, put in a claim for keeping the goods from the 11th of September to the 26th of October, when he released them on being paid the sums he claimed, under a protest. If he had rested his claim on the fact of being Lloyds' agent, I would understand it, but he claims as receiver of droits for a period after the salvage service had ceased. Under the 19th section he is not entitled to compensation, except for services while employed in the saving and preserving of the vessel or cargo; but at the time for which he makes his claim, the salvage was at an end, the cargo was in the hands of the owners, and he took it out of their custody. Under the 19th section, he could not claim for any thing after the 10th of September. The second point must therefore be ruled for the plaintiffs.

Upon the third point; as agent for Lloyds', it was defendant's duty to use every effort to give assistance to the vessel; and he employed men, and rendered every possible aid, and incurred considerable expense: for these services, being of a meritorious kind, he is entitled to remuneration and reimbursement, and is therefore justified in the set-off he claims. When there is an identity between agent and principal as to the transaction, the set-off is maintainable; but here there is more than identity. The defendant is therefore entitled, as Lloyds' agent, to remuneration, by way of set-off, for services rendered in that character.

PERRIN, J.

I am of opinion that the plaintiffs are entitled to recover back the money extorted from them, and that defendant was not author-

ised in claiming the fees he did, under the 19th section of the Salvage Act. But I think that as Lloyds' agent he made legal charges against the plaintiffs; and his set-off is an answer to the action.

E. T. 1853.  
*Queen's Bench*

COATES-  
WORTH,  
v.  
WALSH.

MOORE, J.

During the argument, I thought the keeping the goods might be considered as part of the original service of the defendant, but I have satisfied myself that the 19th section is applicable to salvage only; and that the detention of goods to satisfy the salvagers of the vessel was not contemplated by that section. The action is maintainable to recover back the money of the plaintiffs, whose it was; but I concur in thinking the defendant entitled to the set-off in his capacity of Lloyds' agent, and not as receiver of droits. If entitled to rely on that set-off against Chadwick, the ship-owner, he is equally entitled to rely on it against the plaintiffs, who were Chadwick's agents.



In re STEPHEN DICKSON.

May 3, 5.

MACKAY, on behalf of Stephen Dickson, moved to make absolute a conditional order, that the said Stephen Dickson be discharged from the custody of the governor of the Richmond Bridewell, on the ground that the warrant of committal was defective, in not averring and setting forth respectively with sufficient certainty, or at all, the several facts, proceedings, notices, matters and things necessary by law to ground the assumed jurisdiction in this case to commit; and on the ground that the Insolvent Court had no authority by law to commit said Dickson, being a prisoner in the Four Courts Marshalsea, for an alleged contempt, to the Richmond Bridewell.

A, being a prisoner in the Four Courts Marshalsea, in execution under a *ca. sa.*, the Insolvent Court made an order on a creditor's petition, that A should file a schedule, pursuant to the 3 & 4 Vic., c. 107. A, having disobeyed this order, the In-

solvent Court issued a warrant of committal to the Richmond Bridewell for contempt. *Held*—that the 3 & 4 Vic., c. 107, only authorised a committal to the Four Courts Marshalsea or Kilmainham, for contempt committed by a person in the county or city of Dublin, and that the custody of A, in Richmond Bridewell, was illegal.



E. T. 1853.  
*Queen's Bench*  
*In re*  
 DICKSON.

This committal was made under 3 & 4 *Vic.*, c. 107, s. 54, providing "That in case any assignee or other person shall disobey any rule or order of the said Court, duly made by the said Court, for enforcing the purposes and provisions of this Act, it shall and may be lawful for the said Court to order the person so offending to be arrested and committed, as for a contempt of the said Court, to the prison of the Marshalsea of the Four Courts, Dublin, or to her Majesty's prison of Kilmainham, or to the common gaol of any county, city or place where he or she shall be, or where he or she shall usually reside, and there to remain without bail or mainprize, until such person shall have fulfilled the duty required by this Act, or until the said Court shall make order to the contrary." Dickson had been previously in custody in the Four Courts Marshalsea under a *capias ad satisfaciendum*.

We say the Insolvent Court had no power to deal with Dickson; to give that Court jurisdiction, he should have been twenty-one days in execution without making satisfaction to his creditors.—

[CRAMPTON, J. This is a committal for contempt, how can we deal with it?—The jurisdiction should appear on face of the committal, because the Insolvent Court is an inferior Court acting under a statutable jurisdiction. The 6th section defines the powers of the Commissioners. Where the insolvent is in custody in Dublin, the warrant for committal can only be to the Four Courts Marshalsea or Kilmainham. The words "common gaol" must exclude Dublin, and hence the other two prisons are named. Richmond Bridewell is not a common gaol, but Kilmainham is, and the statute expressly refers to it and the Four Courts Marshalsea. A person when committed for contempt is in criminal custody, not civil: *Ex parte Higgins* (a).

The Prisons Act, 7 *G.* 4, c. 74, distinguishes the several gaols in Dublin, and the Four Courts Marshalsea thereby became the debtors' prison, being under the care of the Marshal. A distinct division was created for debtors, another for those committed for contempt. The 5 & 6 *Vic.*, c. 95, abolished all other prisons for debtors in Ireland. The committal here should have been superadded to the

(a) 9 Irish Law Rep. 414.

detainers to the Four Courts Marshalsea, but the warrant is for a change of custody, and cannot be within the Insolvent Act. The Richmond Bridewell has no such division as the Marshalsea, and cannot be considered a general common gaol. The 7 *G.* 4, c. 74, s. 6, defines the several arrangements to be made in prisons; and by the 101st section of the same Act it is provided that persons arrested in inferior jurisdictions shall be committed to the county gaol. The 109th section sets out rules and regulations for the prisons, which are not applicable to the Richmond Bridewell, because it has no debtors' side. The 6 & 7 *W.* 4, c. 51, converted the Richmond Bridewell into one of the city of Dublin prisons, and provided that the Sheriffs of the county of the city should not be answerable for the custody of prisoners in any of them. The 12 & 13 *Vic.*, c. 55, abolished Newgate; but even before that Act passing, the debtors had been removed out of that prison. The custody is clearly illegal, and Dickson must be discharged.

E. T. 1853.  
*Queen's Bench*  
*In re*  
 DICKSON.

*Meagher and Talbot, contra.*

Richmond Bridewell is a Sheriff's prison, and the Sheriff of the county of the city would be the person to bring the prisoner to the bar of this Court if he were to be here arraigned. The English Insolvent Act has a similar provision to the Irish, and there has been a decision which may guide in this case: *Strad v. Anderson* (a). An insolvent there had been ordered to file his schedule, under 1 & 2 *Vic.*, c. 110, and he refusing, he was removed to a ward in the first class of the prison, pursuant to 11 & 12 *Vic.*, c. 7. He petitioned the Court of Common Pleas to be removed to another ward, on the ground that 11 & 12 *Vic.*, c. 7, applied only to cases where the order to file the schedule had been made previous to the passing of the Act; but the petition was dismissed. That case shows that it was believed to be the intention of the Legislature to apply a pressure to compel a prisoner to comply with the order of the Court. Here Dickson refused to set out in his schedule all his property. The Richmond Bridewell has been substituted for Newgate, and that was a common gaol of the city of Dublin; and if it were lawful

(a) 19 *Law Jour.*, N. S., C. P., 164.

E. T. 1853. *Queen's Bench*  
*In re*  
 DICKSON. to commit to Newgate, it is equally so to commit to Richmond. The offence here is a contempt, but scarcely one on civil process; at all events, it is a case within the 57th section of the Insolvent Act, and fully authorised the committal.

*Mackay* replied, citing *Ex parte Kinning* (a); *Edwards v. Robertson* (b); 1 & 2 Vic., c. 110, s. 66.

*Cur. ad. vult.*

LEFROY, C. J.

May 6.

This case comes before the Court on an application to make absolute a conditional order for the discharge of Stephen Dickson from the custody of the governor of the Richmond Bridewell, on the ground that he was in illegal custody, and on other objections stated in the conditional order. Several objections have been urged, but the important objection is the want of jurisdiction in the Insolvent Court to commit Dickson to Richmond Bridewell for disobedience of the order of the Court. The 3 & 4 Vic., c. 107, has been relied on in support of that objection. The 6th section provides that the Insolvent Court, or any Commissioner thereof, shall have the power of committing all persons guilty of any contempt of the said Court to the prison of the Marshalsea of the Four Courts, Dublin, or to her Majesty's prison of Kilmainham, or to the common gaol of any county in which such person shall be, or shall usually reside. It has been contended that the power of committal for contempt is confined to the Marshalsea and Kilmainham, and that this Act does not authorise a committal to any other prison, as by the Act these prisons are selected exclusively for offenders for the city and county of Dublin, and the words in the section, "common gaol of any county," should be read as applicable only to the gaol of any other county. Looking at the previous Insolvent Acts, there appears a manifest distinction between them and the latter Act, as to dealing with contempts, and it gives a clear solution to any difficulty that may arise. The 1 & 2 G. 4, c. 59, was passed before the constitution

(a) 4 Man. Gr. & St. 507.

(b) 5 M. & W. 520.

of the present Insolvent Court, and the jurisdiction then given was exercisable in different Courts sitting in different counties; and the difference in the words in the present Act arose from the alteration in the jurisdiction. When that statute was in force, there was no Insolvent Court sitting permanently in Dublin; but the 3 & 4 *Vic.*, c. 107, provides that all proceedings and matters to be heard by the said Court for the Relief of Insolvent Debtors shall be had and determined by the said Court, at the Court-house, Ormond-quay, Dublin, unless the said Court shall at any time see cause to appoint its sittings in any other place. Then the 8th section directs the Commissioners to make circuits, and gives them certain powers when on circuit; the intention clearly being that the Court was to hold permanent sittings in the city of Dublin for the city and county, and for other counties circuits should be held at the several assize towns. The section giving the power of committal, instead of using the language of 1 & 2 *G.* 4, to commit to the common gaol of any county, says, "to the prison of the Marshalsea of the Four Courts, Dublin, or to Her Majesty's prison of Kilmainham, or to the common gaol of any county," thus providing for the exercise of committal in whatever place the Court may be. There is another section of the Act material to advert to, as tending to show that the Legislature, in passing the late Act, had before them the fact of there being other gaols in the city and county of Dublin than the two referred to; that is, the 58th section, which uses the words, "where such prisoner shall be in any gaol within the county of Dublin, or the county of the city of Dublin, the said Court shall order such prisoner to be brought before the said Court," &c. The selection therefore of the two gaols specified precludes the implication of any other gaol being contemplated, and shows that the jurisdiction of the Insolvent Court as to committals for contempt of the orders of the Court is confined to the Marshalsea and Kilmainham; it follows, therefore, that the custody in which Dickson now is, is not the gaol to which the jurisdiction to commit applies, and that therefore the custody is illegal; and on a return being made to the *habeas corpus*, we will discharge him.

Order absolute.

[Dickson was subsequently brought up under a *habeas corpus*, issued by the Court, and discharged.]

E. T. 1853.  
*Queen's Bench*  
*In re*  
 DICKSON.

H. T. 1854.  
*Common Pleas*

BROWNE v. ELLIS.

(*Common Pleas.*)

Jan. 14.

The practice under the 16 & 17 Vic., c. 113 (the Common Law Procedure Act), as to charging funds standing in the name of the Accountant-General of the Incumbered Estates Court, at the suit of a judgment creditor of a party interested therein.

SULLIVAN applied, under the 135th section of 16 & 17 Vic., c. 113 (Common Law Procedure Act), for an order to attach the interest of the defendant in a sum of £4620, lodged in the Bank of Ireland to the credit of the Accountant-General of the Incumbered Estates Court, in the matter of Eliza Moore and William Leggate, and Maria Leggate his wife, owners and petitioners, with the payment of a judgment debt due by the defendant to the plaintiff.

The plaintiff was a judgment creditor of the defendant, who had proved a claim against an estate which had been sold in the Incumbered Estates Court. A sum of £4620 had been lodged with the Accountant-General, to the credit of the matter in the Incumbered Estates Court. The plaintiff now sought to have the defendant's interest in that sum charged with the payment of the judgment.

MONAHAN, C. J.

You may take an order to attach the defendant's interest in the £4620, and then, if it turns out that he has no interest in that sum, our order will effect nothing.

The following order was made:—

It appearing to the Court, on motion of plaintiff's Counsel, and on reading the affidavits, that the plaintiff hath recovered judgment against the defendant in the sum of £53. 1s. 5d., and that such judgment is still unsatisfied; and it also appearing that the defendant is possessed of an interest in a sum of £4620, money lodged in the Bank of Ireland to the credit of the Commissioners for the Sale of Incumbered Estates in Ireland, in the matter of Eliza

Moore and William Leggat, and Maria his wife, owners and petitioners, the interest of the defendant in the said sum of £4620 is hereby attached to answer the said debt, with interest thereon, until further order. And the Governor and Company of the Bank of Ireland are hereby ordered and required not to suffer the defendant, George Ashe Ellis, to receive, transfer or deal therewith, until further order; subject, however, to any order which the Commissioners for the Sale of Incumbered Estates may make respecting same, on the application of the plaintiff John Browne.

H. T. 1854.

*Common Pleas*

BROWNE

v.

ELLIS.

## BUCKLEY v. DEVEREUX.

Jan. 16.

COFFEY applied, under the 135th section of the 16 & 17 Vic., c. 113 (Common Law Procedure Act), for an order to charge a sum of £1500, which had been lodged in Court by the London and County Insurance Company, to the credit of an action brought by the defendant as executrix of the will of her mother, to recover the amount of a policy of assurance effected by the latter. The defendant had obtained judgment against the Insurance Company for this sum. The plaintiff had recovered a judgment against the defendant as such executrix, and sought to have this sum charged with the amount of the judgment; such order not to be final, but to be served on the defendant, who could come in within twenty-one days, and apply to have it set aside.

Where the defendant as executrix had recovered judgment against a third party, for a sum lodged in Court to the credit of the action, the Court, at the instance of a creditor who had obtained a judgment against the defendant as executrix, granted an order to charge that sum, pursuant to the 16 & 17 Vic., c. 113, s. 135.

MONAHAN, C. J.

Take the order.

The following order was made:—

On motion of Counsel for plaintiff, and reading affidavit of plaintiff's attorney, and it appearing to the Court that the plaintiff hath recovered judgment against the defend-

H. T. 1854.  
*Common Pleas.*  
 BUCKLEY  
 v.  
 DEVEREUX.

ant as such executrix, in her Majesty's Court of Queen's Bench in Ireland, in Hilary Term 1854, for the sum of £89. 0s. 10d., and that such judgment is still unsatisfied; and it appearing that the sum of £1500 has been lodged in this Court to the credit of a certain cause, wherein the said Selina, as such executrix as aforesaid, is the plaintiff, and the London and County Assurance Company are defendants: the interest of the defendant, as such executrix as aforesaid, in said sum of £1500, is hereby attached, to answer the plaintiff's said judgment debt, until further order; and the Master of this Court is hereby directed not to suffer the defendant to receive or deal with said sum until further order.\*

\* See next Case.

#### BUTLER v. DEVEREUX.

Jan. 24.

Where the defendant, as executrix, had obtained a judgment against a third party for a sum of money, lodged in Court to the credit of the action, the Court refused to charge that sum with the payment of a judgment recovered against the defendant personally, there being nothing to show that she had a beneficial interest in the sum lodged in Court.

J. KERNAN applied, under the 135th section of the 16 & 17 Vic. c. 113 (Common Law Procedure Act), for an order to charge the sum of £1500, lodged in Court under the circumstances mentioned in the previous case, with the payment of a judgment obtained by the plaintiff against the defendant in her own right. It was sworn in the plaintiff's affidavit, that the defendant had a beneficial interest in the assets.

MONAHAN, C. J.

We cannot make this order. We made an order of this kind against this lady† where the judgment had been obtained against her in her representative capacity as executrix of her mother. But in this case the plaintiff's affidavit only amounts to an allegation that, if an account were taken in equity, the defendant would be found to have a beneficial interest in the assets.

No rule.

† See last Case.

H. T. 1854.  
*Common Pleas*

WHITE v. ADAIR.

Jan. 17, 19.

ROBERT SHEKLETON applied, under the 33rd section of 16 & 17 Vic., c. 113 (Common Law Procedure Act), for an order to substitute service of the writ of summons and plaint in an ejectment for non-payment of rent, upon the clerk of a Poor-law union, in such manner as the Court should think fit.

*Quere*—the proper mode of serving the writ of summons and plaint in ejectment against the guardians of a Poor-law union, under the 16 & 17 Vic., c. 113?

There is a difficulty in this case, as to the person who should be served. The Poor-law Act merely states that a union is a corporation for the purpose of suing and being sued, but does not mention who is the person to be served with the writ. The 197th section of the Common Law Procedure Act provides that in actions of ejectment, "the writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the Court or a Judge shall order." Under the former practice it was necessary, in cases of ejectment against a corporation, to apply to the Court for an order to substitute service upon the head-officer.

MONAHAN, C. J.

You had better make inquiries in the office as to the practice in such cases.

*Shekleton* now renewed the application. The former practice arose under the 8th section of 13 & 14 Vic., c. 18 (Process and Practice Act), which directed "that every such writ of summons, issued against a corporation aggregate, may be served personally upon the Mayor or other head-officer, or on the Town-clerk, Treasurer or Secretary of such corporation." In the corresponding section 33 (of the Common Law Procedure Act), the word "clerk," is omitted.—[MONAHAN, C. J. Surely, they have a treasurer.]—The treasurer is usually a banking company, and they have no secretary.

Jan. 19.



H. T. 1854.

*Common Pleas*

WHITE

v.

ADAIR.

MONAHAN, C. J.

We cannot make any order. It is quite plain that if the common process can be served on this corporation under the recent Act, so can the process in ejectment. If you serve the treasurer, and the clerk, as secretary, and publish it in the *Gazette*, you need not fear the result of a motion here to set aside your proceedings.

## KELLY v. BLAKE.

Jan. 21.

Where a judgment had been paid by the representative of the conusor to three out of four trustees in whom it was vested, the fourth being resident out of the country, the Court refused to permit satisfaction of the judgment to be entered under the 143rd section of the 16 & 17 Vic. 113 (the Common Law Procedure Act.)

WALTER BOURKE moved that satisfaction might be entered, under the 143rd section of 16 & 17 Vic., c. 113 (Common Law Procedure Act), on two judgments obtained by Mary Kelly, in Easter Term 1799—one for £400 against Isidore Blake; the other for a similar sum against Maurice Blake. Mary Kelly, the conusee, appointed Eleanor Connoughton her executrix, who assigned both judgments to John Walshe, Nicholas A. Furlong, Austin Killeen and Michael Page, on certain trusts.

Valentine Blake, the owner of the estate, subject to the judgments, subsequently paid the amount of the judgments to three of the trustees. The fourth, Mr. Page, having left the country, the trustees, who had been paid, executed a warrant of attorney to satisfy the judgment; and Mr. Blake's affidavit stated that he could not procure the execution of the warrant of attorney, in consequence of Mr. Page having left the country.

MONAHAN, C. J.

We cannot grant this motion. Your object will be obtained by going into the Court of Chancery, and getting Mr. Page removed as trustee, and having a new trustee appointed. Payment to three of four trustees would not be sufficient. The object of appointing four trustees was that they might be a check upon each other.

No rule.

H. T. 1854.  
*Common Pleas*

## LENEHAN v FITTON.

Jan. 21.

O'REARDON moved that further proceedings in this cause should be stayed until the plaintiff, who was out of the jurisdiction, had given security for costs.

*Chatterton*, for the plaintiff, moved a cross motion, to the effect that judgment should be marked for the defendant on all the issues in fact; that the Taxing-officer should then tax the costs of a demurrer in the cause, which had been decided in favour of the plaintiff; and that the costs of the demurrer should be set off against the costs of the issues in fact, and that the defendant should pay to the plaintiff the balance, if any, found to be due to him; the plaintiff undertaking to pay the balance, if any, found to be due to the defendant.

This was an action of trespass for the seizure of the plaintiff's goods. The declaration contained two counts. The defendant pleaded, first, the general issue; secondly, a special plea of justification, under a civil-bill decree. On the former plea the plaintiff joined issue, and to the latter replied specially; to the replication to the second plea the defendant demurred, and on the argument of the demurrer judgment was given for the plaintiff. No trial had taken place on the issues in fact.

To an action of trespass *de bonis asportatis*, the defendant pleaded the general issue, and a special plea. The plaintiff replied specially to the latter, and on demurrer to the replication obtained judgment. No trial of the issues in fact having taken place, the Court refused an application by the plaintiff that the costs of the demurrer should be taxed and set off against the costs on the issues in fact, he undertaking to permit judgment to be entered on the latter for the defendant.

*Chatterton*, for the plaintiff.

The object of the defendant is to obtain a *stet processus*, which would have the effect of depriving the plaintiff of the costs of the demurrer, to which he is entitled in any event.

*O'Reardon*.

If the plaintiff chooses to discontinue, we could not be forced to enter up judgment on the record. The defendant has made

H. T. 1854. an affidavit of merits. The 40th section of 14 & 15 *Vic.*, c. 57, *Common Pleas* shows that if the plaintiff went to trial he could not recover any costs unless the Judge certified.—[BALL, J. Does that apply to the costs of a demurrer?] In *Abley v. Dale* (a), which was decided on the analogous section of the English Act (9 & 10 *Vic.*, c. 95, sec. 129), it was held that where, in tort, there was an issue of law and an issue of fact, and both were determined in favour of the plaintiff, but the damages recovered were less than £5, the plaintiff was not entitled to *any costs*.—[MONAHAN, C. J. That case seems to be an authority on the point].

LENEHAN  
v.  
FITTON.

MONAHAN, C. J.

The proceedings in this case must be stayed until the plaintiff shall have given security for costs. Suppose the plaintiff were now to go trial, and recover less than £5; in that case, if the Judge should refuse to certify, the plaintiff would get no costs at all; therefore there is no reason why we should give them to him here.

(a) 11 C. B. 889.

BARRON

v.

THE WEST OF ENGLAND INSURANCE COMPANY.

Jan. 23.

In an action on a policy of insurance commenced before the 16 & 17 *Vic.*, c. 113 (The Common Law Procedure Act), the venue being laid in a county of a city, the Court permitted a special jury to be struck, according to the practice existing before that Act, on an affidavit showing that the plaintiff was possessed of considerable influence in the place where the venue was laid, and that several of his relatives would be on the panel.

HARRIS applied for leave to have a special jury struck according to the former practice, under 3 & 4 *W.* 4, c. 91. This was an action to recover the amount of a policy of insurance on the life of Lady Anne Winston Barron, the wife of the plaintiff. The policy was effected on the 27th of November 1850, and Lady Barron died on the 22nd of December 1852. The action was resisted, on the grounds that Lady Barron was, at the time of making the policy, affected with a disease calculated

to shorten life. The venue was laid in the county of the city of Waterford, and the defendants' affidavit alleged that Sir H. Winston Barron, the plaintiff's father, was possessed of great influence in the city of Waterford, and that several of his relatives and friends were on the panel.

H. T. 1854.  
*Common Pleas*  
BARRON  
v.  
WEST OF  
ENGLAND  
INSURANCE  
COMPANY.

Under the former practice, forty-eight special jurors would have been drawn in the first instance, and twelve would have been afterwards struck out by the parties on either side, and the remaining twenty-four would have been summoned to try the case. But by the new practice, under the 112th section of the Common Law Procedure Act (16 & 17 Vic., c. 113), only forty-eight special jurors are to be drawn for each Assizes, and they are all to be summoned to try every special jury case at that Assizes. The twelve jurors to try the case would be selected by ballot at the trial, so that it would not be competent for the defendant to object to any person on the jury list.

MONAHAN, C. J.

Without laying down any general rule as to the cases in which we should permit a special jury to be struck according to the old practice, it occurs to me that the venue being in a limited jurisdiction, and this being a case in which we would probably have allowed the venue to be changed to an adjoining county, on very slight grounds, it is a case in which we ought to permit a special jury to be struck according to the old practice.

TORRENS, J., BALL, J., and JACKSON, J., concurred.

The following order was made:—

It is ordered by the Court that in order to try the issue between the parties in this cause, a special jury of the county of the city of Waterford be struck by the Master of this Court, according to the practice which existed previously to the 1st of January, instant, and pursuant to the statutes in that case made and provided.

H. T. 1854.  
Common Pleas

COLHOUN v. SEMPLE, sen. and SEMPLE, jun.

Jan. 24.

The Court will not, at the instance of the executor of the conuisee of a judgment, permit a suggestion to be entered for the purpose of reviving it, pursuant to the 16 & 17 Vic., c. 113 (Common Law Procedure Act), except in a plain case. Therefore where the affidavit of the party seeking the order disclosed a number of special circumstances, from which the existence of the judgment was sought to be deduced, the Court refused to permit a suggestion to be entered.

W. R. MILLER, on behalf of the executors of the plaintiff, applied, under the 149th section of the 16 & 17 Vic., c. 113 (Common Law Procedure Act), for liberty to enter a suggestion on the record to revive a judgment obtained by the plaintiff against the defendants in Trinity Term 1852.

The facts, as they appeared in the affidavit on which the motion was grounded, were as follows:—The judgment had been marked in an action of debt on a money bond passed by the defendants to the plaintiff for a penal sum of £198. The defendants soon after paid the costs of the action and the interest on the original debt, but made default in the payment of the judgment; and the plaintiff accordingly issued execution on the 24th of November 1852.

The Sheriff seized the defendants' goods under a *fiery facias*; but before the sale had taken place, the plaintiff died, having, by will, appointed James Irwin and Thomas Finnucane his executors. The execution was then withdrawn, the defendants having paid a sum of £50, leaving £50 still due on foot of the judgment.

The plaintiff died on the 1st of January 1853; probate of his will was granted to his executors on the 1st of October 1853. One of the defendants, Semple, sen., died since that period, leaving the other defendant surviving, by whom there is still due on foot of the judgment a sum of £50, and £2 for one year's interest.

BALL, J.

The suggestion contemplated, according to the words of the 149th section, is a suggestion "to the effect that it *manifestly appears to the Court* that such party is entitled to have execution "of the judgment for the said sum." The affidavit here states a number of facts which might be disputed on the opposite side; so that this case can hardly come under the words "*manifestly appears.*"

MONAHAN, C. J.

We cannot make this order. It was stated here lately that the Court of Exchequer had decided that where there was a devolution of interest, they would not make such an order, which would have the effect of depriving the opposite party of the power of pleading. This is not a case in which it "manifestly appears to the Court" that the party is entitled to execution. The proper course will be to sue out a writ of revivor.

H. T. 1854.

*Common Pleas*

COLHOUN

v.

SEMPLE.

No rule.

#### Assignees of CLENDENNING v. BROWNE.

Jan. 31.

O'DONNELL moved that the defendant should be discharged from the custody of the Sheriff, upon an affidavit, stating that the defendant was a Justice of the Peace for the county Mayo; and that while attending the Castlebar Petty Sessions, in the discharge of his duty as such Justice of the Peace, he had been arrested.

A magistrate, attending Petty Sessions in the discharge of his duty, is privileged from arrest.

A magistrate at Petty Sessions is privileged from arrest. The 14 & 15 Vic., c. 93, makes Petty Sessions a most important Court, and declares it to be open and public.

*J. D. Fitzgerald*, for the plaintiff in the execution.

The defendant was not privileged, under the circumstances. No particular Justices are assigned to attend Petty Sessions in any particular district. It was a voluntary attendance on his part. This pernicious privilege ought not to be extended without precedent or authority. The only reported case is *Alexander v. Folville* (a); but in that case the magistrate was returning from Quarter Sessions, at which Court he was bound to attend. *Molloy v. ———* (b) was the case of an Assistant-Barrister at Quarter Sessions. In the *note*

(a) Sm. & Bat. 202.

(b) 10 Ir. Law Rep. 14.

H. T. 1854. to *Alexander v. Folville*, the following passage from *Com. Dig.*,  
*Common Pleas* tit. *Privilege*, A, 1, is given :—" If a " Justice of the Peace, Clerk  
 of the Peace or other officer, be arrested *veniendo* to Sessions, he is  
 privileged." He referred to 7 & 8 G. 4 ; 14 & 15 Vic., c. 93 ; 5 & 6  
 Vic., c. 95.

CLENDEN-  
 NING  
 v.  
 BROWNE.

JACKSON, J.

It is a mistake to suppose that his attendance at Petty Sessions is a voluntary act on the part of the magistrate. It is his duty to attend. It has been established, time immemorial, that a Barrister in the discharge of his duty is privileged from arrest ; but it has been decided in *Newton v. Constable* (a), that that privilege does not extend to Petty Sessions.

MONAHAN, C. J.

This gentleman having been arrested while acting in the discharge of his duty as a magistrate, at Petty Sessions, we think he was then privileged from arrest. Accordingly, we shall make an order for his discharge.

*O'Donnell* applied for costs.

MONAHAN, C. J.

If you could show that the plaintiff in the execution made the Sheriff arrest the defendant at the time of the arrest, you might be entitled to costs, or if your application was against the Sheriff ; but we cannot grant costs in the present case, for the plaintiff was quite entitled to give the writ to the Sheriff to execute.

(a) 1 G. & D. 409.

H. T. 1854.  
*Common Pleas*

## LARGAN v. LARGAN.

Jan. 30.

M'MAHON applied for liberty to file an affidavit of the service of a writ of summons and plaint, in an ejectment on the title, directed by the Court of Chancery, varying from the 185th General Order, by omitting the words "who is in possession of the lands sought to be recovered, or any part thereof," or by inserting, after the above mentioned words, the words, "except the tenants in occupation of the said lands and premises, whose title is not sought to be disturbed in the present action."

This was an action of ejectment on the title, brought by an order of the Court of Chancery, in order to try the validity of a certain deed, and by the said order the Lord Chancellor directed that the plaintiff's title as assignee should not be disputed, and that all temporary bars should be waived.

The 185th General Order requires that "in every affidavit of service of a writ of summons and plaint in ejectment on the title, it shall be stated that the deponent knows not of any person other than those who have been served, who is in possession of the lands sought to be recovered, or any part thereof," &c. Here it is not sought to disturb the possession of the occupying tenant.

In an ejectment on the title, brought by the direction of the Court of Chancery, to try the validity of a deed, the Court refused liberty to the plaintiff to file an affidavit of service, omitting the words, "who is in possession of the lands sought to be recovered, or any part thereof;" although his affidavit stated that it was not intended to disturb the occupying tenants.

MONAHAN, C. J.

There was no necessity for this motion. If the summons and plaint in this case be filed without any affidavit of service, or with an informal one, and the defendant forthwith takes defence, then there is no difficulty in the matter; if he does not forthwith take defence, an application to attach him can be made in the Court of Chancery. We can make no rule.

No rule.



H. T. 1854.  
*In Chamber.*

FREWEN v. THE INCORPORATED SOCIETY.\*

Feb. 9.

(*In Chamber.*)

An inspection of a document will not be granted to a plaintiff, on the plea that it contains a particular clause in support of his case, when the existence of such clause is directly denied by the defendant.

J. D. FITZGERALD (with whom was *L. Hall*) moved for an order under the 14 & 15 *Vic.*, c. 93, s. 6, to inspect the deed of grant under which defendants held certain lands, for which an ejectment was brought by the plaintiff. Plaintiff's affidavit stated that search had been made among the papers of the grantor, and that no counterpart of the deed could be found; and that it contained a clause which would defeat the grant in certain events, which had happened. He cited *Wigram on Discovery*, p. 211; *Hunt v. Blewitt* (a); *Gordon v. Murphy* (b).

*Otway*, contra.

This ejectment is brought on the supposition of the existence of a clause in the deed defeating the grant. The defendants, in their affidavit, deny that there is any such clause in the deed. Such denial was held a sufficient reason against a similar order sought, in *The Attorney-General v. The Corporation of London* (c).

*Hall*, in reply, cited *Beasley v. Tyrrell* (d).

CRAMPTON, J.

The distinction taken by Mr. *Otway* is well founded. You allege the existence of a clause in a deed, which the opposite party denies on oath. This brings the case within the authority cited. If you wanted to use the deed for the purpose of enforcing the payment of rent under it, it would be a different case; but you seek to use it to defeat the deed itself, on the allegation of its containing a clause, the existence of which is negatived by the affidavit of the holders of it.

Motion refused, with costs.

(a) 7 Exch. Rep. 286.

(b) 5 Ir. Jur. 231.

(c) 2 Hall & Tw. 1.

(d) 1 Ir. Com. Law Rep. 365.

\* *Coram* CRAMPTON, J.

H. T. 1854.  
*In Chamber.*

## O'BEIRNE v. DOWELL.

*Feb. 16.*

S. FERGUSON, for the executrix of the plaintiff, moved for an order to revive two judgments by suggestion, under the 149th section of the Common Law Procedure Act, the conusee having died.

The executrix of the conusee had obtained a charging order to charge certain funds of the defendant; but in consequence of her not being a party to the record, it was found that the order could not be acted on. The present motion therefore became necessary. Counsel pressed for an absolute order in the first instance.

Where it becomes necessary to move to revive a judgment within six years by reason of a change of parties, &c., an absolute order may be granted in the first instance; *secus* when after six years.

MOORE, J.

The reasonable construction of the 149th section of the Act is, that the change of parties therein mentioned means a change within the six years mentioned in the 148th section. I shall therefore give you an absolute order as to the judgment obtained in 1849, and a conditional one as to that more than six years old.

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 ANONYMOUS.

*Feb. 16.*

CONCANNON moved that a formal error, in the *postea* in this case, and which was transcribed with the judgment and transcript, should be amended.

The case had gone to the Court of Error.

P. Blake, contra, objected, that the Judge who tried the case could alone amend the *postea*.

transcript, where it is before a Court of Error, to the

A motion to amend a *postea* must be made to the Judge by whom the case has been tried; to amend the judgment in accordance therewith, to the Court of which it is a judgment, and to amend the Court of Error.

H. T. 1854. MOORE, J.

*In Chamber.*

ANONYMOUS.

Unless Mr. *Blake* consents, you must go to the Judge who tried the case to amend the *postea*; then to the Court, to amend the judgment, and finally to the Court of Error, to amend the transcript.

*Blake* refusing to consent to the amendment, the motion was refused, with costs.

### RAINSFORD v. EAGER.

E. T. 1853.

April 16, 18.

(*Exchequer.*)

Where an agreement has been acted on, so that the parties to it cannot be restored to their original position, money paid under it by one party to the other cannot be recovered in an action of debt for money lent and on the account stated, although the plaintiff has taken I O Us for the sums so advanced to the defendant; and that, too, although the agreement may not have been fully carried out, and may not be such a one as would be directly enforceable by reason of the Statute of Frauds: the consideration for the I O Us so given is examinable.

DEBT, for £88, money lent, &c., and on an account stated—Plea, the general issue.

On the trial, before PIGOT, C. B., at the Sittings after last Michaelmas Term, the plaintiff, who was examined, proved a series of payments by him to the defendant, of £1 a-week, which he alleged were loans, and produced I O Us of the defendant in acknowledgment of them. The action was brought to recover these sums. For the defendant it was proved that he had been in possession of a farm called Clownings; and a receiver having been appointed over his interest, and the farm being about to be let under the Court, the plaintiff had agreed to give him £300, and £15 per annum for whatever interest he had in the land; he, the defendant, refraining from competing for the tenancy in the Master's office, and giving his countenance to the plaintiff as his successor. A document was also given in evidence, dated December 9th, 1845, signed by the defendant, but not by the plaintiff, which purported to be an agreement for an assignment of the farm of Clownings from the defendant to the plaintiff, and in which the figures £18 were altered to £15, in the handwriting of the plaintiff. The plaintiff alleged that this agreement was abandoned, and not carried out by what occurred in the Master's office. Another witness for the defence proved that the plaintiff had admitted to him that he had been advancing money on

account of these lands; and it was also proved that he had got and retained an abatement in the rent, from the head landlord, of £16. E. T. 1853. .  
*Exchequer.*

Plaintiff's Counsel, on this state of facts, called on the learned Judge to direct a verdict for the plaintiff. This his Lordship declined to do; but told the jury that there was no binding contract under the Statute of Frauds, but that if there was an agreement in fact between the parties for the sale of the lands of Clowning, independent of the document produced, and if that agreement was acted on by both parties, and not rescinded, and if the money sued for was paid in pursuance of that agreement, the plaintiff was not entitled to recover it back, and they should find for the defendant. Plaintiff's Counsel objected to his Lordship's charge, and asked him to direct a verdict for the plaintiff, on the grounds that there was no evidence of a contract, nor that the plaintiff acted on it. His Lordship refused to do so, but reserved leave to move for a new trial, or that the verdict, if found for the defendant, should be turned into a verdict for the plaintiff. The jury found for the defendant.

RAINSFORD  
 v.  
 EAGER.

A conditional order was this Term obtained, in pursuance of the leave reserved, that the verdict should be turned into one for the plaintiff, or for a new trial, on the grounds that the verdict was against evidence, and for misdirection.

*Ball* (with him *Elrington*) showed cause.

The jury have found that the sums of money for which the IOUs were given, were not loans, but advanced upon a contract for the purchase of lands. The plaintiff's case is, that this contract, not being signed by him, does not bind him, and is not enforceable at law, and that he has received no consideration. The acts done were, first, the payment by the plaintiff; second, the proceedings in the Master's office, in which the plaintiff was supported by the defendant; third, the appropriation by the plaintiff of the abatement of £16, to which, unless on the supposition of the existence of the contract, he was not entitled; fourth, the representations of the plaintiff himself. These were all matters for the jury, and found by them in favour of the plaintiff. The Statute of Frauds has no bearing on the case. It does not invalidate a contract acted on,

E. T. 1853. but merely prevents an action being brought to enforce one, unless  
Exchequer. evidenced in writing, as required by it: *Laythorp v. Bryant* (a).  
 RAINSFORD v. But here the contract has been acted on by both parties. The  
 EAGER. situation of both has been changed, and the money paid cannot be  
 recovered back: *Cocking v. Ward* (b).

*Richard Armstrong* (with *Macdonogh*), contra.

We rely on a total failure of consideration and the absence of any evidence of it. The plaintiff did not get possession of the lands by virtue of the agreement, but in the ordinary way in the Master's office.—[GREENE, B. It would appear that part of the consideration for the agreement, and an acting on it, was the co-operation of the defendant in the Master's office.]—We have got nothing of what we contracted for from the plaintiff.—[GREENE, B. You must show that you cannot obtain the performance of the contract either at law or in equity, before you can get back your money.]

*Macdonogh*, for the plaintiff.

April 18. The I O U s are absolute and unconditional, from 1849 to 1852. The action is for money lent, and on an account stated, and our case was thus conclusive: *Curtis v. Richards* (c); *Douglas v. Holme* (d). To this the answer of the defendant is, the money was paid on a contract concerning lands; but there was no contract for the sale of lands enforceable against the plaintiff, therefore the money may be recovered back for want of consideration. The contract, whatever it was, being reduced to writing, can be proved only by the writing: *Goss v. Lord Nugent* (e); but that is inadmissible in evidence for want of a stamp, and cannot be helped out by parol. There is therefore no evidence whether the contract was for £18 or £15. The defendant insists on retaining money by virtue of a contract impossible to be enforced: *Parteriche v. Powlett* (f). The evidence of the contract was not admissible, and even when admitted, had no effect, as there was no evidence at all of a

(a) 2 Bing. N. C. 744.

(c) 1 M. & G. 46.

(e) 5 B. & Ad. 64.

(b) 1 C. B. 858.

(d) 12 Ad. & El. 641.

(f) 2 Ark. 393.

concluded agreement. In *Cocking v. Ward*, every part of the consideration which one party undertook to give to the other had been given. Here the plaintiff derived no benefit: *Scadding v. Ellis* (a); *Brooke v. Bookett* (b); *Earl of Falmouth v. ———* (c). E. T. 1853.  
*Exchequer.*  
 RAINSFORD  
 v.  
 EAGER.

*Elrington*, in reply.

It was proved, and the jury have found, that there was a concluded agreement, and that it was not rescinded. To support an action of this nature, one of three elements must be found; first, an impossibility to perform the contract, or secondly, illegality of the contract, or thirdly, a refusal by the defendant to perform his part; and there is no case where even a refusal by the plaintiff to perform his part of an agreement has been held as sufficient ground to enable him to bring the action. Our propositions are two—first, we have an agreement valid in law, though possibly not enforceable by action; secondly, the position of the parties has been changed in consequence of that agreement. The agreement clearly is not affected by the Statute of Frauds, but only the evidence of it, and we are not now seeking to enforce it. The use we make of *Cocking v. Ward* is to establish that if the original consideration be not void, but only unenforceable, and after the performance of your part of the contract, you have the aid of a promise from the other party, you can recover upon that; and *Cocking v. Ward* also establishes that parol evidence may be given of that promise. The admission of Rainsford, that the money was paid upon the contract, is as strong as any thing in *Cocking v. Ward*, and enables the defendant to retain the money paid voluntarily by the plaintiff, and by his own admission paid on an agreement which was valid in law. The further transactions which took place in consequence of the agreement, and which would not have taken place without it, have materially changed the position of the parties, and supply a further consideration from the defendant.

(a) 9 Q. B. 866.

(b) 9 Q. B. 847.

(c) 1 C. & M. 109.

E. T. 1853.

Exchequer.

RAINSFORD

v.

EAGER.

FIGOT, C. B.

We have come to the conclusion that, when such an agreement as the present has been acted on by the parties, and they cannot be restored to the *status in quo*, money paid in consequence of it cannot be recovered in this form of action. The plaintiff contended that he was entitled to recover on the account stated; and that on the mere production of the I O Us, no proof could be given by the defendant to contradict them. We think this argument cannot prevail, and that the defendant is entitled to hold his verdict. On this part of the argument, the first question which arises is, whether the consideration for the account stated is examinable on the evidence before the jury, and the manner in which the parties presented the case at the trial? We have lately had to consider, in *Crampton v. Morris* (not yet reported), the nature of the demand on the account stated, and to what extent the consideration for it is examinable on the trial. We rest on the opinion there expressed, viz., that it is essential, to support it, that there should have been a previous debt or dealing on which a liability existed. One of the latest cases on the subject is *Petch v. Lyon* (a), in which it was held that an acknowledgment by a widow of a debt, as due from herself, but which was the debt of her deceased husband to the deceased husband of the plaintiff, and a promise to pay interest on it, would not support a count on an account stated. Lord Denman there says:—"But as the witness, who drew up that memorandum, distinctly proved on his cross-examination that the debt was not due from the defendant herself in her own right, nor to the female plaintiff in her own right, but was a debt from the deceased husband of the one to the former husband of the other, the plaintiff failed in showing that the defendant was indebted to the plaintiff on an account stated." *Thomas v. Hawkes* [per Alderson, B.] (b), and *French v. French* (c), are to the same effect. None of these cases present facts exactly analogous to the present; but they establish that you can inquire whether, at the time of the account stated, the defendant was indebted—that an I O U is examinable to ascertain the considera-

(a) 9 Q. B. 147.

(b) 8 M. &amp; W. 140.

(c) 2 M. &amp; G. 144.

tion for which it was given; and if the existence of a debt be negatived, the defendant can rely on that.

E. T. 1853.  
*Eschequer.*  
RAINSFORD  
v.  
EAGER.

The evidence to establish the dealings about these I O Us was partly that of the plaintiff, and partly that of the defendant. The plaintiff proved the treaty, which he denied to have been completed, and the defendant proved a positive agreement, not binding by the Statute of Frauds, but which, but for the statute, would have been binding. The jury found the existence of the complete agreement, and that it was not rescinded.

The plaintiff was cross-examined as to what the money for which he got the I O Us was paid for; his answer was, that he gave the money as an accommodation and an act of kindness—not denying, however, that it was given in reference to the agreement—but asserting that the spring and motive of his act was kindness. The defendant and another witness proved that the money was paid in pursuance of the contract, and that it was so stated by the plaintiff. Assuming that the evidence was properly referred to the jury, with a view to ascertain the truth upon these conflicting statements, the result of their verdict was clear. It negatived the admission of a debt, established that there was no loan—no admission of a loan—and that the money was received by the defendant in reference to what was then considered a complete contract between the parties. It established that the I O Us were mere vouchers for the payment of money, as they very often are.

The plaintiff then contended that he was entitled to succeed, on the question of consideration; that that had failed on the part of the defendant, and this was the only ground open to him on the finding of the jury. This is a question of law on the facts, and *Cocking v. Ward* (a) is an authority on it—[states it.]—There the contract was complete—in part performed—and for an interest in land. The first count was upon the contract—the second on an account stated, founded on an admission by the defendant of his liability. The Court held that on the first count the plaintiff could not recover, because the contract could not be proved without a writing. But they also held that the plaintiff was entitled to rest on his oral proof of the contract to support the second, although

(a) 1 C. B. 858.



E. T. 1853.

Exchequer.

RAINSFORD

v.

EAGER.

the only consideration for stating the account was a liability not directly enforceable by reason of the statute. Tindal, C. J., there says:—"We think the action also sustainable on principle; for after "the debt has formed an item in an account stated between the "debtor and his creditor, it must be taken that the debtor has "satisfied himself of the justice of the demand, and that it is a debt "which he is morally, if not legally, bound to pay, and which "therefore forms a good consideration for a new promise. We "think this principle applies to cases where the only objection is "that the original debt might not have been recoverable, from the "deficiency of legal evidence to support it." There the conclusion was, that the evidence was inadmissible to prove the contract to establish a direct liability, but admissible to sustain the "account stated," resting on the admission of that which was a debt founded on a good consideration. The plaintiff resorted to the account stated, to establish the liability of the defendant; and the defendant resorted to it, to show the consideration for the stating the account, and that there was no legal liability to support it, and to show the actual consideration.

This case is *a fortiori*. The plaintiff here sought to recover money voluntarily paid by him, with full knowledge of the circumstances under which it was paid. It lay upon the plaintiff to show that there was no consideration for the agreement sufficient to support it. It was examinable also to show what the consideration was, so as to disentitle the plaintiff to recover on the I O U's. There was here an agreement in fact, and a dealing which altered the situation of the parties; and if the money were to be paid back, they could not be restored to their *status in quo*. The money ought not to be restored, as there was not a failure of the whole consideration. Where there has been a partial performance of an agreement, money paid cannot be recovered in this form of action. If, indeed, though the agreement were a valid one, the party sued for the money had done or omitted to do any act which would entitle the plaintiff to rescind the contract, there would then be no consideration for it, and the plaintiff would be entitled to treat it as if no contract had ever existed. But there are also cases which

show that, though the defendant has failed to perform all his part of the contract, yet if he has so far performed it as that the parties cannot be placed in the same position in which they originally stood, the plaintiff cannot recover in this form of action. I shall refer to an authority to illustrate the manner in which Courts deal with the application of this principle: *Beed v. Blandford* (a);—[cites the judgment of Alexander, C. B.]—In the present case there is no evidence of a rescinding of the contract. If nothing had been done upon it, the plaintiff might recover without changing the situation of the parties, but his adversary having acted on it, and so changed his position, it would be against both law and justice that he should recover. The defendant was the owner of a leasehold, of which he had the prospect of a renewal, and being embarrassed in his circumstances, he agrees to sell his interest to the plaintiff. There was a receiver over it, and it was arranged that the defendant should apply to have him discharged, and a tenant improperly in possession removed, in order that the plaintiff might be in a condition to obtain the tenancy. The plaintiff goes into possession, and obtains an abatement of the arrears, and the defendant acts on the agreement, and accepts the money from the plaintiff, which he was entitled to say he would not take as a loan. He is in the position of the party described by Alexander, C. B. (vide *Beed v. Blandford*). If these things were not done on the faith of an agreement, the defendant might have sold to another purchaser, and relieved himself from his debt; and it would be unjust to permit the plaintiff, after the defendant receiving this money as a right, to turn him into a debtor new, after the lapse of several years. There was evidence in this case of both parties acting on a contract; they cannot be restored to their *status in quo*; and the money paid cannot be recovered on the *account stated*, because it never was a debt. The defendant is therefore entitled to hold the verdict. The jury have found, first, that there was a contract; secondly, that it was not rescinded; and thirdly, that both parties acted on it. We do not disapprove of the verdict, and by our decision do not invade the Statute of Frauds.

GREENE, B., concurred.

(a) 2 Y. & J. 278.

E. T. 1853.  
*Eschequer.*  
 RAINSFORD  
 v.  
 KAGER.

E. T. 1853.

Eschequer.

## THOMAS v. MANNIX.

April 23.

The Court will not review the taxation of its officer in a matter purely for his discretion, and where he has transgressed against no legal principle.

J. D. FITZGERALD (with him *J. Crawford*) moved that the Taxing-master should be ordered to review his report, and to allow the costs of certain witnesses, which he had disallowed.

The action was brought on a promissory note for £449, and the defendant, having been called on to admit the handwriting, alleged it to be a forgery; it therefore, considering the rank of the parties, became necessary to summon a number of witnesses from different places where the defendant had resided, to prove his handwriting. Witnesses had therefore been brought from Pembrokeshire, from Dublin, and from Cork to Belfast, to establish that fact; but the Taxing-master had refused to allow the expenses of a number of them. The defendant on the trial had permitted judgment to go by default. Counsel submitted that, in a case where forgery was relied on as a defence, the plaintiff must of necessity produce a number of witnesses to prove handwriting, and that he should be allowed the expenses of all *bonâ fide* produced by him. This was not the ordinary case of simple neglect to admit handwriting, but here there was a distinct allegation of forgery.

*Longfield*, contra, urged that this was a case for the discretion of the Taxing-master. Fifteen witnesses, at an expense of £450, had been brought from Cork and Dublin to Belfast, where none of the witnesses resided. The Taxing-master had allowed the expenses of seven of them.

GREENE, B.

The CHIEF BARON concurs with me in thinking that this is a case for the discretion of the officer, and that we cannot interfere in it, no legal principle being involved, unless, indeed, there were some gross misprision on his part.

No rule.

E. T. 1853.

Exchequer.

## HARRIS v. O'MEAGHER.

MACDONOGH (with whom was *Semple*) moved that the Sheriff of Tipperary should amend his return to the writ of *fi. fa.* in this case by returning *nulla bona*, or "goods on hands for want of buyers." He had made a special return, stating the issuing of seven other executions, to his predecessor, under which he had seized; that the goods were in the hands of the former Sheriff for want of buyers, and that he, the present Sheriff, had seized them in his hands. Under these circumstances the Sheriff was bound to treat the antecedent writs as fraudulent and void, and to return either *nulla bona* or goods on his own hands for want of buyers: *Lovick v. Crowder* (a). The plaintiff on this return could neither issue a *venditioni exponas* or bring an action: *Prendergast v. Lord Glengall* (b).

Where a Sheriff's return to a writ of *fi. fa.* is so informal as to be calculated to deprive the plaintiff of the fruits of his execution, or seriously embarrasses him in bringing an action against the Sheriff, the Court will, on motion, compel him to amend it.

*Meagher*, contra.

The Sheriff could not make any other return. *Chambers v. Coleman* (c) affords a precedent for it. He could not return *nulla bona* until he had ascertained whether the proceeds of the sale of the goods would cover the prior executions. Besides, immediately after notice of this motion was served on the Sheriff, he offered, with the consent of the plaintiff, to put a return of *nulla bona* on the file; the goods having been then sold, and the amount realised falling far short of the former executions.

*Semple*, in reply.

We could not bring an action on the return as it stands; that is the test of its being irregular: neither could we issue a writ of *venditioni exponas*, because there is no positive allegation that the goods are in the hands of the present Sheriff.

(a) 8 B. & C. 132.

(b) 1 Ir. Jur. 609.

(c) 9 Dow. P. C. 588.

E. T. 1853.

*Exchequer.*

HARRIS

v.

O'NEAGHER.

Pigot, C. B.

The return is insufficient. It states the delivery of a number of previous executions to the former Sheriff, and his seizure of the goods by virtue of them; and that the present Sheriff had had seized those goods in the hands of the former, and that there were no other goods. We cannot conclude from these allegations that the goods are at present liable to be extended in satisfaction of all those executions. The return does not allege that the goods continued in the hands of the former Sheriff under the executions delivered to him, or were, at the time of the return under those executions. The return is therefore calculated to embarrass the plaintiff in bringing an action against the Sheriff if he has not done his duty. There are other objections to the form of the return. It amounts to this, that he has seized certain goods, which he cannot sell under the writ of *fi. fa.* at the suit of the plaintiff, nor can the plaintiff, upon the return, obtain a writ of *venditioni exponas*. His execution therefore becomes wholly unproductive. We must therefore grant this motion, but without costs, beyond those incurred up to the offer by the Sheriff, after notice of the motion, to return *nulla bona*.

E. T. 1852.

Eschequer.

GEORGE D. FOTTRELL, Assignee of JOHN CLANCY,

v.

THE HEIR AND TERTENANTS OF ARTHUR A.  
GRIFFITH.

April 26, 27.

DEMURRER to a *scire facias*, to revive a judgment against the heir and tertenants of the conusor, and to the return thereto. The *scire facias* stated the recovery of a judgment in the Court of Exchequer, in Hilary Term, in the fifty-fifth year of the reign of George the Third, by John Clancy against Arthur Achmuty Griffith, for a certain debt of £575. 8s. 4d. of the late Irish currency, as also for £2. 12s. 1d. of the same currency for damages. That after the recovery of the said judgment, the said John Clancy, by deed duly executed according to the form of the statute, assigned the judgment debt and damages aforesaid, according to the form of the statute in such case made and provided, to George Drevar Fottrell, in Michaelmas Term, in the 15th year of the reign of her present Majesty, Queen Victoria. That the said Arthur Achmuty Griffith was dead, and died seised in his demesne as of fee or of a descendible freehold of divers lands and tenements in the county of Monaghan, and that execution of the judgment yet remained to be done. The *scire facias* then proceeded in these words:—"We therefore command you that by honest and lawful men of your bailiwick you make known as well to the heirs of the said Arthur Achmuty Griffith, deceased, as also to the several tenants to the lands and tenements which were of the said Arthur Achmuty Griffith, deceased, in the aforesaid term of Hilary, in the fifty-fifth year of the reign of his late Majesty, King George the

A *sci. fa.* issued by the assignee of a judgment, directed the Sheriff to make known as well "to the heirs of the conusor of the said judgment, as also to the several tenants to the lands and tenements which were of the said conusor, &c., to show if they have or know anything to say for themselves wherefore the debt and damages aforesaid ought not to be made, &c., according to the said recovery." The Sheriff returned that he had "made known to the within-named A B and C, heiresses-at-law of the said conusor, and also to D and E, tenants to the lands and premises within-mentioned." *Held*, that though

the words, "the lands," in the *sci. fa.* meant "all the lands," they had not that signification necessarily in the return, and that it was therefore bad on special demurrer, for ambiguity. *Held also*, it is sufficient in a *sci. fa.* at suit of assignee of a judgment, to pray judgment "according to the said recovery," without the addition of the words "and assignment."

*Quare*—Necessary to specify the lands by name, in the return.

E. T. 1852. *Exchequer.*  
**FOTTRELL**  
**v.**  
**GRIFFITH.**

"Third, aforesaid, or whereof he was at any time afterwards seised  
 "in your bailiwick, to whomsoever they have come, that they and  
 "every of them may be before the Barons of our Exchequer at  
 "the Queen's Courts, Dublin, on the 12th day of December, instant,  
 "to show if they have or know any thing to say for themselves,  
 "wherefore the debt and damages aforesaid ought not to be made  
 "of these lands and tenements, and rendered to the said George  
 "Drevar Fottrell, according to the said recovery, if to him it shall  
 "seem expedient; and then have you there the names of those by  
 "whom you shall make it known to them, and this writ: witness,"  
 &c. The Sheriff made the following return to the *scire facias*:—  
 "By virtue of this writ, by James Graham and John Murphy,  
 "honest and faithful men of my bailiwick, I have made known  
 "to the within-named Margaret Griffith, and Rachael Achmuty  
 "Griffith, heiresses-at-law of A. A. Griffith, and also to John  
 "Gillespie, and James Gillespie, and Marshall Moore, tenants to  
 "the lands and premises within-mentioned, that they be before the  
 "Barons of the Exchequer on the day and at the place within-  
 "mentioned, to show as within-mentioned: so answers," &c.

A demurrer was taken to the *scire facias* and return by James Gillespie, mentioned in the return, as to the lands and premises whereof the said James Gillespie was so returned tertenant; and the said James Gillespie, according to the form of the statute, stated amongst others the following causes of demurrer to the *scire facias* and return:—That the time and place of the assignments of the said judgment by said deed are not averred in the said *scire facias*, or that the memorial of said deed was duly executed pursuant to the statute. That the Sheriff was not commanded by the said writ to summon the several tenants of all the lands and tenements in his bailiwick which were of the said A. A. Griffith, deceased, at the time of the rendition of the said judgment, or whereof he was at any time afterwards seised. That the said writ of *scire facias* prays execution according to the recovery of the judgment aforesaid merely, and omits to pray execution for the said George Drevar Fottrell as assignee, according to the form and effect of the said assignment of the judgment aforesaid. That the said George Drevar

Fottrell is not designated in the said writ in his proper character as assignee of the said judgment. That the said writ varies and departs from the usual and accustomed forms of such writs. That the return to the writ was framed as if the said writ were a special writ under O'Neill's Act, and was applicable to a proceeding under said Act only. That the return assumed that Margaret Griffith and Rachael A. Griffith, therein described as heiresses-at-law of A. A. Griffith, were named in the writ of *scire facias*, although no such persons in fact are therein named. That the return does not state that the Sheriff summoned *all* the tenants to the lands and tenements in the return mentioned. That the Sheriff does not in his return state there were no other tenants of the said lands and tenements in the return mentioned, or that there were no tenants of any other lands or tenements within the bailiwick of the said Sheriff, and also that the return did not follow the exigency of the said writ of *scire facias*. That the return did not specify by name, or other sufficient description, the lands and tenements therein mentioned, or the lands and tenements whereof the said Arthur A. Griffith was seised at the time of the rendition of the said judgment, or over which he had a disposing power which he might have exercised for his own benefit, without the assent of any other person. That the Sheriff did not by his return certify that there were not any other heirs, or any other tenants of the lands and tenements, rectories, rents or hereditaments, whereof the said Arthur A. Griffith, or any other person, to the use of or in trust for him, was seised in fee, or of a descendible freehold, or over which the said Arthur A. Griffith had a disposing power which he might, without the assent of any other person, exercise for his own benefit at the time of the rendition of the said judgment, or at any time afterwards, within the bailiwick of the said Sheriff. That the said return is on the face of it defective and evasive, and does not supply sufficient information to enable the said James Gillespie to plead to the action. Also that the return varies from the established forms of returns in such cases, and is in other respects uncertain, &c.

E. T. 1852.

Exchequer.

FOTTRELL

v.

GRIFFITH.



E. T. 1852.

Exchequer.

FOTTELL

v.

GRIFFITH.

*M<sup>r</sup> Blain* opened the demurrer.

The judgment appears on the face of the *sci. fa.* to be barred by the Statute of Limitations. There is no allegation of a judgment of revivor: *Ferguson v. Livingston & Wife* (a). Neither is it averred in the *scire facias* that the judgment had been assigned, and that it was recoverable by the force of such assignment. In the form in *Ferguson's Forms*, p. 354, the following words are contained:—"According to the form of the said recovery and of said statute." The omission of the words "recovered against," in a writ of *scire facias*, was held fatal on special demurrer: *Moriarty v. Wilson* (b). The right of a party suing must be proved as it is averred: *M<sup>r</sup> Sweeney v. Longfield & others* (c). Jebb, J., says:—"These words, 'as incumbent of the parish of Templeroe,' are an allegation of the right in which the taking of the distress is avowed, and limit the defendant to the proof of a taking in that right. So, where a plaintiff declares as executor, he can only recover in that capacity; and if he merely describe himself executor, his title must be in his own right." A *scire facias* should conclude with the averment, "*quare executio fieri non debet*," and if the words "*fieri non debet*" be omitted, the omission is fatal: *Com. Dig. Pl.*, p. 523. If the words, "according to the recovery," were altogether omitted, the *sci. fa.* would be bad, as a violation of established forms. The return is framed as if it were a return to a writ of *sci. fa.*, under 26 G. 3, c. 31; for it refers to persons supposed to be named in the writ, using the words, "the within-named." There should have been either an allegation that the tenants summoned are the tenants of all the lands, or a negative clause stating there were no other tenants of the lands or tenements of the conusor: *Tidd's Forms*, p. 483, *Appendix* to 9th ed.; *Panton v. Hall* (d). In the note (7) to *Jefferson v. Morton & others* (e), the case of *Panton v. Hall* is referred to; and the rule in that case is laid down as follows:—"2 *Salk.*, p. 598, *Panton v. Hall*. The return of the Sheriff was held ill, because it was that A, B and C

(a) 9 Ir. Eq. Rep. 202.

(b) 1 Ir. Law Rep. 52.

(c) 2 H. &amp; Br. 194.

(d) Carth. 105.

(e) 2 Saund. 9.

"were tenants of lands, instead of tenants of all the lands in his bailiwick ; but the present return seems proper without the word "all," because it is afterwards averred that there were no other tenants of the conusor in his bailiwick whom he could warn." This case is also referred to in *Com. Dig., Pleader*, p. 528, and in 2 *Tidd's Practice*, p. 1124, 9th ed. Consistently with the return, there may have been other heirs-at-law of the conusor of the judgment. That the return is a departure from the established forms, and bad on that ground: *M'Nevin v. Dalton* (a).

E. T. 1852.  
*Exchequer.*  
**FOTTELL**  
*v.*  
**GRIFFITH.**

*O'Callaghan*, with *D. Lynch*, in support of the pleading.

With respect to averring that execution was sought as assignee of the judgment, it is not necessary ; having stated the fact of the recovery and assignment of the judgment, it is sufficient then to pray execution, without alleging that it is according to the assignment and recovery. The case of executors is different, as there the character is representative, or *en autre droit*, and the judgment of revivor is different in its results from that by the original conusee or assignee ; yet it has been decided that even in the case of a *sci. fa.*, by the executor of the conusee, whereby the defendant was called on to show cause why the plaintiff should not have execution against the heir, according to the form of the recovery, without stating "as executor," the averment is sufficient: *Haynington, executor, v. Cairnes* (b). The same point was ruled in *Vance and another, executors of Falls, v. Brassington* (c)—[PIGOT, C. B. You need not trouble yourself any further on that point.]—The main point then is on the return, whether the omission of the word "all" is fatal to it, there being no negative words. But it is submitted that the return here is equivalent to a return of the tenants of "all" the lands, which would be sufficient. The *scire facias* itself states "the lands and tenements of Arthur A. Griffith, within the county of Monaghan ;" those words must mean "all" the lands.—[PIGOT, C. B. We are agreed that the words of the *scire facias* must be taken to mean all the lands, as it is its business to include

(a) 4 Ir. Law Rep. 406.

(b) 5 Ir. Law Rep. 333.

(c) 1 Ir. Jur. 8.

E. T. 1852. *Exchequer.* all the lands, and the language employed must be taken in its ordinary sense.]—The Sheriff speaks in his return by reference to the *scire facias*, and the words “the lands and tenements within-mentioned” must mean the lands and tenements in the *scire facias* mentioned; that is “all” the lands and tenements.—[GREENE, B. Suppose the conusor of the judgment had two properties—Blackacre and Whiteacre, and four tenants on each—it would be consistent with the present return that only one tenant on each denomination had been served.—PIGOT, C. B. It may mean all the lands, or only some of them; it being an indefinite proposition, signifying some of the lands or all, but not of necessity all.]—But the words of the *scire facias* meaning all the lands, the return must by relation mean the same thing: *Panton v. Hall* (a). The return in that case uses the word “*tenentibus*,” that might mean all or some of the tenants—there being no article in the Latin language, that word is more ambiguous than the words “the tenants” on the lands: *Snel v. Tertnants of the Earl of Anglesey* (b).

This precedent shows that the word “tenants” means the tenants, or all the tenants. The negative certificate does not say there are no other tenants of the lands specified; but that there are no tenants of other lands.—[PIGOT, C. B. I think the tenant of a particular holding means sole tenant; but the indefiniteness of the expression “the lands” creates the difficulty.]—The reference to the writ renders the expression definite.—[GREENE, B. The words in the *scire facias* must mean “all the lands,” or there is nothing in the objection: if they do not mean that, the Sheriff would not have deviated from his duty in not citing the tenants of “all the lands,” and the return would be good.]—The presumptions of ordinary pleading do not apply to cases on *scire facias*: *Kelly on Scire Facias*, p. 276; *Cullen v. Sharkett* (c); *Attorney-General v. Hartley* (d). Pennefather, B., there said: “To a certain extent, “here a writ is taken as a declaration; but not altogether so, for it

(a) 2 Salk. 598; S. C. 2 Saun. 9, n. 7 to *Jefferson v. Morton*; S. C. Car. 195;

S. C. Coke's Rep. 620 b, 621 a.

(b) 2 Lil. En. 385.

(c) 6 Ir. Law Rep. 239.

(d) Hayes & Jones, 763.

"does not require many of the certainties which ought to be in a  
 "declaration:" *Lee's Dictionary of Practice*, p. 1238.

E. T. 1852.

*Exchequer.*

FOTTRELL

v.

GRIFFITH.

*J. D. Fitzgerald*, in reply.

A demurrer to the *scire facias* and return is the proper mode of raising the question, as appears from the authorities referred to. It is essential that the lands should be specified, in order that the tenant may plead as to the particular lands in his possession; and the plea always begins by referring to the lands by name, in reference to which he has been summoned: 3 *Nelson's Abrid.*, p. 199; 2 *Lilly's Entries*, p. 381.

PIGOT, C. B.

We are of opinion that the return in this case cannot be sustained. A portion of the argument would indicate that we should consider the object of the writ of *sci. fa.* was merely to give certain parties notice of the proceedings, that they might have an opportunity of coming into Court, and showing cause why execution should not issue; but it has a further object, for there may be several persons who have become affected by the judgment, although they were not so originally; and the object of the writ, as to such persons, is to afford to every person who is sought to be made liable to the judgment, in reference to the lands of which he is the alleged tenant, an opportunity, if there are also other lands liable to the judgment, of specifying the tenants of these lands, for the purpose of relieving himself of a portion of the liability: therefore, in order to enable a party to make this defence, or any other which, under the circumstances, he may be enabled to do, it is requisite that the return should contain all the necessary averments with reasonable certainty. The course of precedent has been (at least in most cases) to allege that the tenants of all the lands have been warned, and that there are no other lands of the consor of the judgment liable. It is not alleged that the Sheriff should not specify that the tenants of all the lands had been warned. The decision of the case of *Panton v. Hall* (a) certainly shows that there is a necessity for making some such return; and the prece-

(a) *Supra.*

E. T. 1852.

Exchequer.

FOTTRELL

v.

GRIFFITH.

dents referred to, which we must regard as showing the general practice, use this form ; but it is contended that, although the complete allegation is not contained in the return by itself, yet that the terms of the return, coupled with the terms of the *scire facias*, show that there was a sufficient service of the writ, as well as if there had been the averment in the return that the tenants of all the lands had been served. The language used in proceedings on *scire facias*, such as the present, is of an established character, and the Courts will not suffer it to be departed from lightly. A certain form of words is used, and a certain meaning attached to them in practice ; and it would be attended with manifest inconvenience to allow that form to be departed from. We may treat the words in the writ as sufficiently indicating the duty the Sheriff had to discharge ; but it by no means follows that he is to be permitted, in making his return, to depart from the ordinary language, and employ language that is in itself ambiguous, and that does not show clearly what he has done in obedience to the exigency of the writ. In the present case, the Sheriff may mean to say by his return, either that he has summoned all the tenants of the lands liable, or that he has summoned a certain number, and that there are no others ; and either of those expressions would convey the idea clearly that he had discharged the duty imposed upon him. Why then does he not say so expressly ? If he has industriously avoided making use of the words generally adopted in returns of writs of *scire facias* of this description, and in accordance with precedents in general use, and has, on the contrary, availed himself of expressions of more limited extent, then either there is, or it may be fairly conjectured there may be, some reason for his doing so ; therefore, if there is any possibility that inconvenience may arise to the parties, or that they may be embarrassed or misled, we should hold that the expressions employed in his return are ambiguous, and do not indicate that the Sheriff has summoned the tenants of all the lands : and this defect being pointed out by special demurrer, and no negative words appearing to remove the ambiguity, we are of opinion that the demurrer should be allowed on that ground. The other point in the case it is not neces-

sary to decide; but the Sheriff should, according to my impression of what was intended to be decided in *Panton v. Hall*, specify the lands, and proceed to say that these were all the lands liable; and if the present form of return were to be used, I should consider that it would involve considerable ambiguity. In the case of only one tenant, the averment of his being tenant excludes the notion that there are any other persons holding the lands; but when it is alleged in the return that A, B and C are tenants of the lands, and it is not shown that they are tenants of any particular lands, the question may arise whether they are joint tenants of all the lands, or each a tenant of a part. Such an ambiguity may be productive of inconvenience, as the results may be very different, whether the tenants hold jointly or in a different way, in adjusting the proportions that the parties should contribute; and the case of *Panton v. Hall* would, I think, support that view of the case; however, we are not now called on to decide that question.

E. T. 1852.  
*Erchequer.*  
FOTTRELL  
v.  
GRIFFITH.

GREENE, B.

I am disposed to take the same view of the case of *Panton v. Hall* as that expressed by my LORD CHIEF BARON; but as I concur with the Court as to that portion of the case upon which the judgment is founded, it is unnecessary for me to express any opinion upon the other portion of it, which I should hesitate to do without further consideration. The return appears to me to be so far ambiguous as to be bad; and on that ground, without at all determining whether or not it is necessary to specify the lands in the proceedings, the demurrer must be allowed.

Demurrer allowed.

E. T. 1853.  
*Exch. Cham.*

*Exchequer Chamber.\**

Ex parte THE DRAINAGE COMMISSIONERS.

April 20,  
 May 22, 25.

(Reserved Case.)

By 5 & 6 Vic., c. 89, s. 60, it is provided that if any existing bridge, culvert, &c., for the discharge of water, under any public or county road, be insufficient for that purpose, and thereby cause the flooding of, or injury to, any land to be drained by the works directed under the Board of Works, or when by reason of such works, any road is relieved from periodical flooding, it shall be lawful for the Commissioners to have the same re-constructed, and to determine, by a declaration under their hand and seal, the proportion of the expense of such re-construction or relief from flooding, which shall be defrayed by the county or counties respectively, or any barony or half-barony of such counties within which such bridge, &c., may be situate. A declaration made by the Board of Works under this section as to the amount to be levied off the county or barony is not conclusive on the county or barony; but the sum properly payable by the county and barony is to be determined on a traverse to the presentment.

THIS was a case reserved by Monahan, C. J., from the last Assizes of the county of Fermanagh. It appeared that the Commissioners of Public Works had, in pursuance of the powers vested in them by the 5 & 6 Vic., c. 89, and other enactments, published a declaration, whereby, after reciting that in the execution of the necessary works for the drainage and improvement of lands in the district of Derryhina, in the county of Fermanagh, and in the districts of Ballinamore and Ballyconnell, in the counties of Fermanagh, Cavan, Leitrim and Roscommon, they were of opinion that the several bridges mentioned in the schedule thereunto annexed, for the discharge of the waters under the public or county roads in same schedule, were insufficient for the free discharge of such waters; and by reason thereof did tend to cause the flooding of certain lands drained and improved by the works for drainage in that district; and that, in pursuance of such powers, the said bridges had been *re-constructed* and *altered* in such manner as appeared to them sufficient; and that the expense of such re-construction and alteration amounted to the sums stated in the schedule thereto: the Commissioners did declare and determine that the said expenses should be defrayed as stated in the schedule, and in the respective proportions therein set forth.

\* *Coram* LEFROY, C. J.; MONAHAN, C. J.; PIGOT, C. B.; TORRENS, J. CRAMPTON, J.; PERRIN, J.; BALL, J.; JACKSON, J., and GREENE, B.

# SCHEDULE

Referred to in the foregoing DECLARATION, and to be considered as part of same:—

Name of Bridge, Culvert or Archway, as the case may be.	Road on which situated.	County or Counties in which situated.	Barony or Baronies in which situated.	Expense of re-construction and alteration.	County or Counties, Barony or Half Barony, as the case may be, which shall defray such expense.
Correclare Bridge .....	Belturbet to Enniskillen old road	Fermanagh	Knockinny .....	£ s. d. 47 5 7	County of Fermanagh at large.
Derrygurdry ditto .....	Derrylin to Derrygurdry	Ditto	Ditto	36 4 10	Barony of Knockinny, in the said County of Fermanagh.
Derrylin ditto .....	Belturbet to Enniskillen...	Ditto	Ditto	2 18 2	County of Fermanagh at large.
Aghalane Bridge .....	Ditto Ditto.....	Fermanagh and Cavan	Knockinny and Lower Loughtee	673 5 7	County of Fermanagh at large to pay this sum of £673. 5s. 7d., being the proportion of the cost of the bridge chargeable to it; the remaining portion of the cost has been charged to the County of Cavan, and presented for by the grand jury of that County.
				759 14 2	

R. GRIFFITH, }  
THOMAS A. LARCOM, }

Two of the Commissioners of Public Works in Ireland.



E. T. 1853.  
*Exch. Cham.*  
*Ex parte*  
 DRAINAGE  
 COMMISSIONERS.

In pursuance of that declaration, the grand jury of the county of Fermanagh were called on to present the sums so charged upon that county. The grand jury declined to present these sums, objecting to the £47. 5s. 7d., and £2. 18s. 2d., as exceeding what the works might have been executed for; and also objecting to the £673. 5s. 7d. as being more than should have been apportioned on the county of Fermanagh; and that such sum so charged was part of a greater sum than should have been at all charged for the works so executed; and proposed that the objections so made should be raised by a traverse to the declaration.

The Chief Justice was of opinion that the objections were not properly the subject of a traverse, and considered the only matter properly the subject of traverse to be, the proportions in which the sums stated in the declaration were to be raised off the county at large, or the baronies, barony or half-barony; but that the declaration was conclusive as to the sum to be presented and levied. He, accordingly, by consent of Counsel on both sides, reserved the following question for the opinion of the Judges—

“Whether, according to the true construction of the 60th section of the Act of 5 & 6 Vic., c. 89, the declaration of the Commissioners was conclusive as to the said sums?”

*J. Perrin*, with him *Griffith* and the *Attorney-General* (Brewster), for the Board of Works.

The parties are not entitled to question the necessity for the works, or the amount. The 12th section vests the power solely in the Commissioners. The appeal which was given to the Assistant-Barrister by the 35th section (since taken away by the 9th Vic., c. 4, s. 15), did not enable him to ascertain the amount. The 60th section shows that the Commissioners alone are to judge of the necessity for the alterations and improvements. The 88th section enables them to expend money for the purposes of the Act, and the 99th section, to borrow money for the same purpose. If this power be not vested in the Commissioners, very great inconvenience would follow. The 19th section shows that they alone are to determine the matter and amount of the works to be executed, and that the determination

they arrive at cannot be questioned by any person whatever. The declaration makes no reference to the amount, showing conclusively it cannot be called into question; and on the trial of the traverse, the only question would be if the sums were properly proportioned?

E. T. 1853.  
*Exch. Cham.*  
*Ex parte*  
DRAINAGE  
COMMISSIONERS.

*H. Law* (with him *Sproule* and *Napier*), contra.

It is admitted that the Commissioners are exclusively the judges of the necessity and proper mode of re-constructing these bridges, &c., and even of the amount to be so expended. It is clear too, that the entire of the moneys so expended by the Commissioners must be repaid, so that the securities of the different persons who have advanced moneys to them, as provided by the Acts, will remain wholly unaffected. The real question is whether, where the re-construction of a county bridge has become necessary for perfecting the drainage of the district, the *entire expense* of such re-construction is to be borne by the county *in certain proportions*, as is said on the other side; or whether, as we say, the county is in such case to pay only a *proportion* of such expenditure, leaving the residue as before a charge upon the district drained, as part of the ordinary expenses of such drainage. It is submitted that the latter is the grammatical and rational construction of the 60th section. It will be observed that that clause dealt with two classes of cases, in which the county may be called on to contribute. One of these is the present case, where a bridge sufficient for all county or public purposes as a roadway is yet insufficient for the discharge of the greater volume of water brought down by the drainage works, and where consequently the re-construction of such bridge becomes necessary; of which necessity, as well as the mode of, and proper putting in re-construction, the Commissioners are exclusive judges. The other case is where, without touching the county road at all, by the mere fact of the adjacent district being drained, the road is relieved from periodical flooding. Having thus described these two cases, and given the Commissioners complete power in the former to remedy the evil, the section further authorises them "to determine by "a declaration in writing, under their hands and seals, the propor-

E. T. 1853. "tions of the expenses of such re-construction or relief from flooding  
*Exch. Cham.* "which shall be defrayed by the county or counties respectively, or  
*Ex parte* "any barony or half barony of such county or counties within  
DRAINAGE "which such bridge, &c. may be situated." Now it is plain that  
COMMISS- the entire expense of relieving the road from periodical flooding, that  
SIONERS. is to say, of draining the district, cannot be thrown on the public, because they get this incidental benefit; and if "the proportions of the expenses to be defrayed by the county," &c., means part only of "the expenses of such relief from flooding," as is admitted on the other side, how can the very same words in the same sentence, as applied to the other subject, "such re-construction," have a totally different signification, and mean *the entire* of such expenses in certain proportions? Again, it is evident that a traverse is given in *every* case; but if the construction on the other side be right, there can be no traverse but where there are proportions; and thus by not apportioning the expenses, but determining that the entire cost of each work shall be borne by any one county or barony, or half barony, the Commissioners may deprive the cess-payers of their traverses altogether. This construction, too, would lead to infinite confusion and absurdity; for instance, one of two counties thus charged traverses the declaration, and apportions the sums almost entirely on the other, leaving only a shilling on itself; the second county, in return, does the like; which then is to prevail? The same may take place between baronies of the same county, or between the county and its own barony or baronies, if the *proper apportionment of the entire burthen* is the object of the traverse. But the question is completely settled by the latter part of the section, which says that "such *sum* as shall be found upon such traverse shall be "inserted in the declaration by the Court before whom the traverse "shall be tried, and the grand jury are to present the *sum* or *sums* "mentioned in such declaration, whether as originally made or "as altered on the traverse; and in case they refuse to present *the* "*sum* so mentioned, &c., or which shall be found," &c., the Court is to make an order for the levying of the same. There is not a word here about "proportions:" on the contrary, it is evident that the traverse deals only with "*the sum*" mentioned in the declaration,

which the petit jury may reduce if they think fit, to an amount representing the benefit which may have been conferred upon the county by the substitution of a new bridge for an old one, or by having the road relieved from winter floodings. This construction makes the entire Act rational and consistent, requiring from the county only a contribution proportioned to the benefit received, and leaving the rest of the expense, like any other drainage outlay, to be borne by the lands drained, the owners of which, after full notice of all the works required, and their probable cost, have advisedly put the Commissioners in motion, and must of course pay for these operations—[see sections 3, 8, 10, 12, 17, 19]—whilst the county as such had neither interest nor option in the matter. When the bridges are insufficient for county purposes, different provisions are applicable—[sections 145; 146]—and where the county is to be benefited by improvement of navigation in common with drainage, or to pay for the same, they have the means of exercising an option on the matter, in the first instance, just like the landowner—[see sections 5, 7, 8, 12, 14, 22.]—So in like manner the Act provides that mill-owners, who obtain an incidental benefit, shall contribute proportionably—[section 48.]—On the whole, therefore, it is submitted that our construction of the 60th section is not only the strictly grammatical, but also the only rational one, and consistent with the other provisions of the Act, and that consequently the declaration of the Commissioners in this case is not conclusive as to the amount to be levied on the county or its baronies.

T. T. 1853.  
*Exch. Cham.*  
*Ex parte*  
 DRAINAGE  
 COMMISSIONERS.

*Cur. ad. vult.*

MONAHAN, C. J.

This case, which was reserved by me from the last Summer Assizes of the county of Fermanagh, is one of considerable difficulty, depending on the construction to be put on the statute 5 & 6 Vic. c. 89. The question turns upon the 60th section of that Act, for though other sections have been referred to, and observed upon, during the argument, none of them throw much light on the question, which really is, what is the true construction of that section?

May 25

T. T. 1853.  
*Exch. Cham.*  
*Ex parte*  
DRAINAGE  
COMMISSIONERS.

That section enacts "That if any existing bridge, culvert or archway for the discharge of water, under any public or county road, shall in the opinion of the said Commissioners be insufficient for the free discharge of such water, and shall, by reason of such insufficiency, cause or tend to cause the flooding of or other injury to any of the land to be drained or improved by the proposed works, or where, by means of any such works, any public or county road shall be relieved from periodical flooding, it shall be lawful for the said Commissioners to have the same reconstructed in such manner as to them shall appear sufficient, and to determine, by a declaration in writing under their hands and seals, the proportions of the expenses of such reconstruction or relief from flooding, which shall be defrayed by the county or counties respectively, or any barony or half barony of such county or counties, within which such bridge, archway, culvert or road, or any part thereof may be situated;" and it then provides the mode in which the traverse is to be conducted.

The question I reserved was, whether the declaration, made by the Board of Works under that section, was conclusive as to the amount to be levied off the county, or the baronies of the county, when the bridge was erected? It was contended, on behalf of the Board of Works, that the declaration was conclusive, and that the entire sum expended in the building of the bridge was to be borne by the county, or the county and the baronies of the county; the only question to be tried on any traverse being, how the proportions were to be distributed between the county and its baronies.

On the other hand, it was contended, on behalf of the grand jury, that the entire sum expended was not to be levied off the county and its baronies, in other words, to be paid by the public.

We are unanimously of opinion that the declaration is not conclusive as to the amount to be levied off the county and its baronies, or, in other words, as the sum to be paid by the public; but that the sum properly payable by the county and its baronies, or, in other words, by the public, is to be determined on the traverse. I therefore should have received this traverse, and it must consequently go back and be tried at the next Assizes.

T. T. 1853.  
*Queen's Bench.*

THE QUEEN, at the prosecution of The Rev. F. M'CARTHY,

v.

THE POOR-LAW COMMISSIONERS.\*

(*Queen's Bench.*)

May 27.  
 June 3.

MANDAMUS.—The writ recited that, under 1 & 2 Vic., c. 56 (first Irish Poor-law Act), the House of Industry, in the county of the city of Dublin, became vested in the Poor-law Commissioners for the purposes of the Act; that a portion of the building had been converted by the Commissioners into the North Dublin Union Workhouse, and that same was situate in St. Michan's parish, in the county of the city of Dublin. It then recited that the Poor-law Commissioners were, under the Act, to take order for the performance of religious service in the Workhouse, and to appoint chaplains for that purpose, who were to hold office during the pleasure of the Commissioners, but that nothing should authorise them to appoint more than one fit person, being in holy orders, and of the Established Church, one other fit person, being a Protestant dissenter, and one other fit person, being a priest or clergyman of the Roman Catholic Church, to be chaplains in such Workhouse; and that in the appointment of such chaplains, preference should be given to some clergyman of the Established Church officiating within the parish in which the Workhouse was situate, if duly qualified, and in like manner to the dissent-

Under 1 & 2 Vic., c. 56, s. 48, the Poor-law Commissioners are to take order for the performance of religious service in the Workhouse, and to appoint a fit person to be chaplain, to hold office during pleasure, provided that in such appointment preference shall be given to some clergyman of the Established Church, officiating within the parish where the Workhouse is situate, if duly qualified.—

*Held*, on a return to a mandamus requiring the Commissioners to appoint the curate of the parish to the office (the rector having waived his right), that the Commissioners are the sole judges of the fitness for such office, and that a return, setting out that in their discretion and judgment they had appointed a duly qualified person, could not be questioned.

*Held also*, that the words, "preference shall be given to some clergyman of the Established Church, officiating within the parish," do not amount to an exclusion of all other clergymen; and that the other words, "if duly qualified," refer to something of which the Commissioners are to judge; "officiating" meaning doing the duty of an office.

*Held also*, that mandamus was the proper remedy, because the title of the prosecutor is asserted upon a supposal that the title of the party in possession is colorable or void; *quo warranto* does not lie for an office held during pleasure.

*Semble*.—In applying for the conditional order, the party benefited was the party in whose name the cause should be entitled.

\* LEFROY, C. J., *absente*.

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 THE  
 POOR-LAW  
 COMMIS-  
 SIONERS.

ing and Roman Catholic clergymen. It stated that the Rev. F. M'Carthy, at the time of the appointment thereafter specified, was in holy orders, and a clergyman of the Established Church, officiating within and throughout the parish of St. Michan, and duly qualified, under the provisions of the Act, to be appointed Protestant chaplain to the North Dublin Union Workhouse; that the Commissioners, in contravention of the provisions of the Act, and not regarding their duty in that behalf, had appointed the Rev. T. R. Shore to that office, he not then, nor now, being a clergyman of the Established Church officiating within the said parish, or authorised to officiate throughout or within the parish by the incumbent thereof, or duly qualified in that behalf; and that they had refused to appoint the prosecutor to the office, according to the statute, &c. The writ then commanded the Poor-law Commissioners to appoint the prosecutor to the office, or show cause, &c.

To this writ the Commissioners made a return, certifying a sealed order of the Commissioners, of 24th of December 1847, by which the Rev. C. S. Stanford, then incumbent and rector of St. Michan's, was appointed a chaplain of the North Dublin Union Workhouse; that he was forthwith admitted to that office, and so continued until his removal by the Commissioners; that certain charges having been preferred against Mr. Stanford by the Roman Catholic clergyman, for distributing tracts among the inmates, of a controversial tendency, an inquiry was instituted by the Commissioners; and in the exercise of their discretion, and according to their judgment, for the public interest, they considered it fitting that Mr. Stanford should resign the chaplaincy. The return then set out a sealed order of the Commissioners for his removal, and stated that for some time previous to Mr. Stanford's removal, a part of the duties of the chaplaincy was done by Mr. F. M'Carthy, who was his curate, and nominated by him as such; and that he officiated within the parish in no other character than as such curate; that Mr. M'Carthy circulated the tracts in question, and the Commissioners, deeming that injurious to the discipline of the Workhouse, did not consider Mr. M'Carthy

a fit person to be appointed chaplain; that they considered and concluded that the Rev. T. R. Shore was a fit person, and duly qualified to be appointed to the said vacant office, having been, and still being, a clergyman of the Established Church, and in priest's orders, and a bachelor of divinity in the University of Dublin, and being then and still qualified to hold an ecclesiastical appointment, and being then and still chaplain to the House of Industry, and a clergyman of the Established Church officiating within the parish of St. Michan. The return then stated that the House of Industry had vested in the Commissioners, and that a portion of it had been converted into a Workhouse, the other part remaining as a House of Industry, consisting of hospitals; that the greater portion of the remaining part was in St. Michan's parish, and that the House of Industry was supported by parliamentary grants, and that the patronage of the chaplaincy to the House was in the Crown; that Mr. Shore was appointed to that chaplaincy by the Lord Lieutenant, on the 11th of November 1844, and on the 12th of March 1845 he was duly licensed by the Archbishop of Dublin to read the book of common prayer, and perform all offices and celebrate all holy ordinances incident to his functions therein, according to the rites and ceremonies of the Church of England, by virtue of which appointment Mr. Shore did, and still does, officiate as such chaplain; and at the time of his appointment by the Commissioners, he was enrolled in the visitation roll of the diocese of Dublin, and that he was subject to the visitation of the rural Dean. It then alleged his appointment as Protestant chaplain of the North Dublin Union Workhouse, under a sealed order of the Commissioners, of 20th of January 1852; and concluded by submitting that they were not bound to appoint Mr. M'Carthy to the office.

To this return a demurrer was put in by the prosecutor; the principal ground being that the return did not show, except by intendment, that the Commissioners had appointed any clergyman of the Established Church, officiating within the parish, to the office of chaplain; that it did not show that Mr. M'Carthy was not a fit person; that the distribution of tracts was no ground of unfitness,

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 THE  
 POOR-LAW  
 COMMISSIONERS.



T. T. 1853.

*Queen's Bench*

THE QUEEN

v.

THE

POOR-LAW

COMMISS-

SIONERS.

and that it did not aver any good reason for not appointing him.

When the motion was made, applying for the writ of mandamus, in Trinity Term 1852, it was sought for on behalf of the rector and churchwardens of the parish of St. Michan, and in their name was discussed, and the conditional rule was so entitled on the authority of *Regina v. The Poor-law Commissioners* (a); but during the argument it was thrown out that such form of order was wrong, and that the party to be benefited was the person in whose name the rule should go. The Court, however, refusing to review a solemn decision, on motion, suggested that the order should be amended, so that neither party might be prejudiced, and ultimately on consent, the rule for the mandamus, taken out in the name of the rector and churchwardens, was discharged, and a new rule for a primary writ of mandamus to the Commissioners, in the name of Mr. M'Carthy, was granted. To that writ the above return was filed.

*Drury and Napier* (with them *Martley*), in support of the demurrer.

This question turns on the 48th section of 1 & 2 Vic., c. 56, which obliges the Poor-law Commissioners to appoint to the chaplaincy of the Workhouse a clergyman of the Established Church, officiating within the parish. With the exception of the rector, who is not seeking the office, the prosecutor, as his curate, is the person to be appointed: *Regina v. The Poor-law Commissioners* (b). There Bushe, C. J., says, "The rector of St. Michan's continues to be rector of that portion of St. Michan's which lies within the new parish of Grangegorman; his rights and duties are both expressly saved by the statute. He is the *persona ecclesiæ*, the parson; and is entitled to all tithes and dues accruing in the new parish, save so far as the endowment may interfere. The cure of souls remains in him expressly, as before the passing of the Act. He is therefore the real officiating clergyman within the new parish, and his duty he may perform personally or by his curate." The Commissioners have a perfect right to appoint any clergyman officiating within the parish, and we have nothing to do with the

(a) 2 J. &amp; Sy. 721.

(b) Ibid.

grounds of their dismissal of Mr. Stanford; that was done in their discretion. But does not that very section, the 48th, contemplate the case of the curate's being appointed to the chaplaincy? Every statute is imperative, and the Court must see if its provisions be complied with. But does non-compliance with its provisions avoid the Act? The Commissioners are bound to show good grounds for not preferring some of the curates officiating within the parish; and the question then arises, is Mr. Shore an officiating clergyman within the parish? The nature of this appointment has reference to the recognised discipline of the parish. No one can officiate in the parish against the will of the rector, unless by operation of some Act of Parliament, and there is no private chapel Act but provides for the consent of the rector. A private chaplain cannot baptise, or do other religious acts without the authority of the rector, and it is the duty of the rector to have the spiritual wants of the parishioners provided for; to have the poor attended to and relieved, and to have the collections for the poor taken under his order; and this discipline is the law of the land. Can the Poor-law Commissioners intrude into a parish or workhouse a person whom the rector may not at all recognise?

In the present case, the rector and the one curate waive their right in favour of the second curate, Mr. M'Carthy; and this application is made to the Court, because the rector is bound to maintain his parochial rights, and though the rector may be removed from the chaplaincy on personal grounds, his curate cannot be passed by. No child can be baptized in the Workhouse without the consent of the rector; he has the control of the celebration of divine service; he is responsible to the bishop, and is bound to have that service celebrated. As to the rights of rectors: *Bliss v. Woods* (a); *Moysey v. Hillcoat* (b); *Williams v. Brown* (c); *Farnsworth v. Bishop of Chester* (d). The license of the bishop cannot be substituted for the will of the rector; and it could not be intended by the Poor-law Act to give the Commissioners a power to enable a clergyman to do acts which his ecclesiastical

T. T. 1853.  
*Queen's Bench*  
THE QUEEN  
v.  
THE  
POOR-LAW  
COMMISS-  
SIONERS.

(a) 3 Hag. 486.

(b) 2 Hag. 30.

(c) 1 Curt. 55.

(d) 4 B. & C. 568.

T. T. 1853.  
*Queen's Bench*  
**THE QUEEN**  
**v.**  
**THE**  
**POOR-LAW**  
**COMMISSIONERS.**

superior had not given him power to do. The person officiating in the parish, under the law of the land, is the person to be chosen for the office. It must be conceded a *quo warranto* will not lie in such a case; and what then remains? The Commissioners are bound to do an act in a particular way, and fill up the office from a particular class, giving the preference to certain persons in the parish. The 7 G. 4, c. 74, c. 68 (Prisons' Act), contains an analogous provision to 1 & 2 Vic., c. 56, s. 48, and since its passing, the practice has been uniform, to appoint the parochial clergy to the office of chaplain in the prisons. The word, "officiating," in the section, means the clergyman of the parish officiating within the parish, and not merely at some place in the parish. We cannot tell how Mr. Shore is appointed; his license is to perform divine service in the House of Industry, and exercise the functions of his office as a clergyman doing the proper duties of a clergyman; but still that does not give him a *status*—officiating means acting officially, and it must be throughout the parish, not in a private chapel. In *Trebec v. Keith* (a), Lord Hardwicke says:—"The word officiating ought not to be so construed; for reading prayers, or a sermon in a private family, is not performing divine service."

*E. Pennefather* and *Macdonogh* (with them the *Attorney-General* (Brewster), in support of the return.

The Commissioners allege by their return that they have appointed a fit person to the office of chaplain; and when a discretion is vested in a public body, or in an individual, this Court will not interfere with the exercise of that discretion: *The King v. The Mayor and Aldermen of London* (b); *The Queen v. The Braintree Union* (c); *The King v. The Poor-law Commissioners* (d)—[The Court intimated that position would not be controverted.]

The Commissioners cannot be compelled to appoint an officer removable at pleasure; no mandamus lies in such a case: *The Queen v. The Justices of Middlesex* (e); *The Queen v. The Visit-*

(a) 2 Atkyn, 498.

(b) 3 B. & Ad. 255.

(c) 1 Q. B. 130.

(d) 6 Ad. & Ell. 54.

(e) 9 Ad. & Ell. 540.

*ing Justices of the Middlesex Asylum* (a). Where no result can follow from the inquiry, the Court will not grant a mandamus: *The Queen v. The Northwich Savings Bank* (b); *Ex parte Harvey* (c). If, as contended, the word "officiating" refer merely to the rector, vicar or curate, what is the use of the word "preference" in the proviso to the 48th section? The statute is not limited to the parochial clergy; but even if it were, the Commissioners have done their duty according to their judgment, and the Court cannot review that appointment. When the Legislature wished to limit a duty, or confine it to a class, as in the Prisons Act, 7 G. 4, c. 74, s. 68, they have used the words "incumbent, rector or vicar;" but in the Poor-law Act the words are general:—"That in the appointment of such chaplain, preference shall be given to some clergyman of the Established Church officiating within the parish in which such workhouse shall be situated, if duly qualified; and in like manner to some Dissenting minister and some clergyman of the Roman Catholic religion, if duly qualified, acting as such within the parish."—[LEFROY, C. J. Does that mean a clergyman locally discharging duty, or discharging parochial duty? Suppose the case of three or four churches in one parish.—PERRIN, J. As in Armagh, where there is the cathedral church and the parish church.]—The Legislature intended to prevent a total stranger, unconnected with any parochial duty in the parish, being appointed.—[CRAMPTON, J. Suppose the case of a private chaplain to a nobleman, and the people of the parish attending his ministrations, would he come within the Act?—So we say, and also would the chaplain of the Archbishop doing service in the palace—whereas the other side must argue that the proviso only applies to the rector, vicar and curates.—[MOORE, J. The words "some clergyman" seem to give a more extended scope to the proviso.]—Any one doing duty within the parish as a clergyman is eligible for the chaplaincy, that is, one lawfully ministering to some people in the parish. The words, "officiating within the parish," prevent the consideration of its applicability to the merely

T. T. 1853.  
*Queen's Bench*  
THE QUEEN  
v.  
THE  
POOR-LAW  
COMMISSIONERS.

(a) 2 Ad. &amp; Ell. N. S., 433.

(b) 9 Ad. &amp; Ell. 729.

(c) 7 Ad. &amp; Ell. 739.

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 THE  
 POOR-LAW  
 COMMISSIONERS.

local clergymen. Mr. Shore has been appointed to read prayers and visit the sick, and that within a place where the parish clergy had no right to enter.—[PERRIN, J. He officiates *within* but not *throughout* the parish.]—This is not a case in which a mandamus can go. The office is full, and was filled under the sealed order of the Poor-law Commissioners at the time the conditional order was granted. If *quo warranto* do not lie, neither will a mandamus, and if a *quo warranto* do lie, then the remedy by mandamus cannot be applied.—[LEFROY, C. J. You do not argue that a *quo warranto* would lie for this office; any thing that is enjoined by statute may be compelled by mandamus.—CRAMPTON, J. A difficulty might arise if the office were colorably full.]—The office here is filled up by the only persons who can appoint to it. In *Tapping on Mandamus*, p. 182, it is said:—"But where an office is full, by "the appointment of the person who *prima facie* or ordinarily "has the right of appointment, and where there are means of "trying the title by action, as, by refusing to pay the fees, &c., the "Court will not grant a mandamus against the party filling the "office, in order to try the title, especially where it is doubtful "whether or not an information in the nature of a *quo warranto* "will lie for the usurpation of such office."—[CRAMPTON, J. Suppose a clergyman appointed, not coming within the terms of the Act of Parliament, is that appointment void?—LEFROY, C. J. Is in short this appointment a good or bad one?—If it be not absolutely a bad appointment the Court cannot interfere; a curate can have no right inchoate or otherwise entitling him to make this application; the rector has a *status*, and is entitled, or at least may have a right to insist on being appointed, but the curate is the servant of the rector: 2 *Burn. Ecc. Law*, p. 61, tit. *Curate*. If the rector have the power of dismissing the curate, it must be argued that he had the power of compelling the Commissioners to appoint him. The curate may be eligible, but he has not such an inchoate right or *status* as to insist on this Court interfering on his behalf; and where a rector has lost the office for sufficient cause, the ordinary rule applies, of the accessory following the principal. The 48th section of the Act is but declara-

tory in favour of the discretion of the Poor-law Commissioners; for if the words, "preference shall be given," mean but "appointment," then the proviso is absurd. The case is not bettered, by the application being made on behalf of the curate than if it were made by the rector himself—for where is the obligation on the part of the Commissioners to appoint Mr. Stanford's curate to the office? The object of the Legislature was to leave unfettered the discretion of the Commissioners, though in the statute it was recommended that in a particular appointment a preference should be given; but that gave no right to any one. Mr. Shore was eligible, and within that rule as to preference; and even if not, that rule does not give such a right to any one as would enable this Court to interfere in the appointment. Fitness or unfitness is for the Ecclesiastical tribunal. In *Carr v. Marsh* (a), what is meant by "officiating" is explained; it is but the administration of divine service: *Ex parte Inge* (b); *Re Beloved Wilkes' Charity* (c). The case in 2 J. & Sy., relied on by the prosecutor, is distinguishable in this, that the point in issue there was as to locality, and it was the rector who sought the office.

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 THE  
 POOR-LAW  
 COMMISSIONERS.

*Napier* replied.

The question as to whether the Court had jurisdiction to grant this mandamus cannot be now discussed, since by 9 & 10 Vic., c. 113, s. 6, the validity of the return may be questioned on demurrer. The only question is, if this return be a valid one? *The Queen v. The Bristol Dock Company* (d); *Rex v. Barker* (e); *The King v. Rector and Churchwardens of Birmingham* (f); *Rex v. Bedford Level* (g); *Rex v. Kinahan* (h); *Rex v. Mayor of Oxford* (i). As to the words "within the parish," he referred to 7 & 8 Vic., c. 59, s. 4; and as to the power of removal, he cited *Castello's case* (k).

*Cur. ad. vult.*

(a) 2 Phil. 196.

(b) 2 Russ. & Myl. 601.

(c) 3 Mac. & Gor. 447.

(d) 2 Q. B. 64.

(e) 3 Burr. 1265.

(f) 7 Ad. & El. 254.

(g) 6 East, 356.

(h) 12 Cl. & Fin. 542.

(i) 2 Salk. 429.

(k) 3 Law Rec., N. S., 153.

T. T. 1853.

*Queen's Bench*THE QUEEN  
v.THE  
POOR-LAW  
COMMISSIONERS.

June 3.

CRAMPTON, J., delivered the judgment of the Court.

This case comes before us upon a demurrer to the return to a mandamus. The North Dublin Union Poorhouse is situate within the parish of St. Michan, in this city; of that parish the Rev. Charles Stanford is the rector, and the Rev. C. F. M'Carthy is his curate. In 1847 Mr. Stanford was appointed by the Commissioners chaplain to the workhouse, and so continued to be until the 6th of January 1852, when he was removed by the Commissioners. The grounds of that removal are stated in the return now before us; but with their sufficiency or insufficiency we have nothing now to do. Upon the vacancy thus produced, the Commissioners appointed the Rev. T. R. Shore to the chaplaincy. Mr. Shore was, at the time of and before his appointment, chaplain to the House of Industry, which is under the same roof with the Poorhouse, and also within the parish of St. Michan's. The prosecutor Mr. M'Carthy asserted his right, as curate of St. Michan's, upon the removal of the rector, to be appointed the chaplain in his room, and the mandamus was issued to compel the Poor-law Commissioners to appoint him to the chaplaincy. The mandamus relies upon Mr. M'Carthy's title as a Protestant clergyman, officiating within the parish of St. Michan's—the rector waiving his right—and alleges that the appointment of Mr. Shore was not warranted by the statute 1 & 2 Vic., c. 56, s. 48, and requires, accordingly, the Commissioners to appoint the prosecutor to the chaplaincy. The return states the appointment to the office in question of the Rev. Mr. Stanford in 1847, his subsequent removal, for the reasons therein mentioned, in 1852; it states Mr. M'Carthy, for the reasons stated by them, was not a fit person, under the circumstances, to be appointed; that Mr. Shore, officiating within the parish as chaplain to the House of Industry, was a fit person; and that, in the exercise of their best discretion, and according to their judgment for the public interests, they appointed Mr. Shore.

Thus two answers are suggested by the return to this mandamus; first, that in the judgment of the Commissioners the prosecutor was not a fit person to be appointed to the chaplaincy; and secondly, that Mr. Shore was a fit person, within the statute which empowers

them to appoint. If in either of these respects the return is good, then the demurrer must be overruled, and judgment given for the defendants.

Before entering upon the two defences suggested by the return, I would notice an objection made by the defendants' Counsel, which would go, independently of the return, to defeat this proceeding altogether. It was objected that though the case might be a case for a *quo warranto*, yet it was no case for a mandamus, the office in controversy being full.

To this I answer, in the first place, that such an objection would more properly be urged in opposition to the issuing of the mandamus upon the motion for that purpose, than upon the argument of a demurrer after the mandamus issued, and return made thereto.

But secondly, the objection is not applicable to such a case as the present; in *quo warranto* generally the title of the party in possession of the office is questioned; in mandamus, the title of the prosecutor is asserted upon a supposal that the title of the party in possession is void or merely colorable. In this case *quo warranto* would not lie, the office being one held merely at pleasure: *Darley v. The Queen* (a); and upon the supposition that the appointment of Mr. Shore was contrary to the statute, and therefore a void appointment, mandamus was the proper proceeding: *The King v. The Rector and Churchwardens of Birmingham* (b).

I come now to the demurrer. Two questions have been raised upon this demurrer, first, has the prosecutor Mr. M'Carthy shown a title to be appointed in the room of Mr. Stanford? Secondly, is the appointment of Mr. Shore a legal appointment under the statute? The answers to these questions turn upon the construction of the 48th section of the statute of 1 & 2 Vic., c. 56, the first Irish Poor-law Act.

By that section the power to appoint chaplains is vested in the Commissioners; the Protestant chaplain must be in holy orders, and of the Established Church. The Commissioners are thus the patrons of this preferment. They exclusively have the right of

T. T. 1853.  
*Queen's Bench*  
THE QUEEN  
v.  
THE  
POOR-LAW  
COMMIS-  
SIONERS.

(a) 12 Cl. & Fin. 542.

(b) 7 Ad. & El. 254.



T. T. 1853.  
*Queen's Bench*  
**THE QUEEN**  
 v.  
**THE**  
**POOR-LAW**  
**COMMISSIONERS.**

appointing; that appointment is to last only during their pleasure, and the appointee is removable at their discretion. Two only restrictions there are to this unlimited power; the first is, that they appoint only a clergyman of the Established Church; who is a *fit* person to discharge the duties of the office; and the second is, that they give a preference to some clergyman officiating within the parish. Who is to judge of this *fitness*? Surely the patrons in whom exclusively the appointment is vested; there is no other tribunal to appeal to on this subject: their power of appointment and of removal within the statutory limits is uncontrolled and uncontrollable. But it is argued that the word "fit" has a technical sense here; that it means canonically fit to be admitted to a benefice, according to the requirements of the ecclesiastical law, and that it is only the bishop who can examine into this fitness; the effect of this interpretation would be to give no sensible meaning whatever to the term "fitness." Every licensed clergyman of the Established Church would in this sense be a fit person, and all equally fit, and the Commissioners would have no test or criterion by which their selection could be guided. The same section also directs the appointment of a fit person to be a Protestant Dissenting chaplain, and a fit person to be a Roman Catholic chaplain. The word "fit" must have the same meaning as applicable to the three classes, and it is plain that the fitness of the Protestant Dissenting clergyman, and of the Roman Catholic chaplain, must be a fitness of which not a synod or bishop but the Commissioners themselves are to judge. On this section, omitting for the moment the consideration of the proviso, it is clear that the Commissioners, and the Commissioners only, are to judge of the fitness or unfitness of the candidates for these chaplaincies. Personal character, activity, zeal, and various other circumstances may be influencing matters in the selecting of a chaplain.

But then comes the proviso at the end of the section, which (as the prosecutor's Counsel construe it) will do away with all power of selection in the Commissioners, and vest the appointment of the Protestant chaplain virtually in the rector of the parish.

A preference is to be *given to some clergyman of the Established Church officiating within the parish*. Now taking this to mean that a preference is to be given to the parochial clergy, that is, to the rector and his curates, does it also mean that this preference amounts to an exclusion of all other clergymen? for to that extent the argument of the prosecutor's Counsel must be pushed. If the parish minister be unfit for the duty, then the case of a preference does not arise, for this preference to the officiating clergy of the parish is subject to the condition that they be "duly qualified." Now, being an officiating parish minister, he must be deemed to have been ecclesiastically qualified before his admission by the bishop to the cure of souls within the parish; and therefore the condition, "if duly qualified," must refer to something else, something of which the Commissioners and not the bishop is to judge, and that is his fitness for the office of chaplain—his fitness in point of years, activity, zeal and discretion, as well as physical capability. There is a similar enactment in the Prisons Act, 7 G. 4, c. 74, s. 68, but the words used are not "a fit person," but "a proper and discreet person;" of this the grand jury are to judge. In the case of the Protestant Dissenting minister, and the Roman Catholic chaplain, it cannot be doubted that the words, "if duly qualified," are tantamount to some "fit person" in this Act, or some "proper and discreet person" in the Prisons Act.

I think it is therefore clear that the Commissioners, and the Commissioners only, can judge of the fitness of any clergyman to fill the office of a chaplain to the Poorhouse, and that the preference to be given to the parochial clergy is only a preference to be given to such persons as in their judgment are fit persons to discharge the duties of the office; and that in the exercise of their discretion, within the statutory limits, the Commissioners are not answerable to this Court, or to any body or person, for the selection they make. Whether or not the reasons which the Commissioners (perhaps unnecessarily) have spread upon this return are good and sufficient reasons, or not, I shall not say. I shall only say that if they had good grounds for dismissing Mr. Stanford, they have the very same grounds for refusing to appoint Mr.

T. T. 1853.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**THE**  
**POOR-LAW**  
**COMMISSIONERS.**

T. T. 1853. *Queen's Bench*  
 THE QUEEN  
 v.  
 THE  
 POOR-LAW  
 COMMISSIONERS.

M'Carthy ; and I can see no difference between their power to remove and their power to appoint in this respect ; and yet their right to dismiss Mr. Stanford has not for a moment been questioned. I see no difference either between Mr. Stanford's right to this appointment, and that of Mr. M'Carthy ; if Mr. Stanford had been the prosecutor here, his case would have been the same as that of Mr. M'Carthy ; for if the Commissioners have no power to judge of the fitness of the candidate, but that a valid right exists in the rector and his curates, a previous removal cannot avoid the right. The determination of this first question decides the demurrer in favour of the defendants.

But I wish to add somewhat upon the second question, namely, whether Mr. Shore can within the statute be considered as belonging to that class to which a preference by the statute is to be given. Now this question was settled by the case in 2 *J. and Sy.*, p. 721, and we have heard nothing to induce us to believe that that case was not rightly decided. That case decides that the rector of the parish and his curates are those to whom the preference under this statute should be given (if duly qualified). The clergymen officiating within the parish are the parochial clergy, those who have the cure of souls within the parish, that is, throughout the parish. There was much of learned discussion about the word "officiate" occurring in this 48th section. The ordinary meaning of this word, and its meaning, as I apprehend, in the statute, is "to do the duty of his office," and the extent of the duty will be exactly in proportion to the sphere of that duty ; the only doubt here arises upon the words "within the parish." What is meant by officiating within the parish ? Now a bishop officiates within his diocese and throughout every part of it ; a parson or rector officiates within his parish and throughout every part of it ; a chaplain officiates within his chapelry and throughout every part of it ; and in all these cases the bishop, the parson and the chaplain have a duty to perform within the prescribed limits, and an exclusive jurisdiction within those limits, subject however to the proper ecclesiastical control. The parson's jurisdiction is within

and over the whole parish, the chaplain's jurisdiction within and over his whole chapelry; but that latter jurisdiction, though exercised locally within the parish, cannot be said to be officially exercised in the parish; that is, it is a local, not a parochial office, and stands therefore on the footing of the chaplain in a school, or in a nobleman's house. The duties in all are in some respects similar, but some there are of a general nature, which can be performed by the parochial clergy only. We therefore say that the appointment of Mr. Shore is a valid appointment, not because he is a clergyman officiating within the parish; he is not, he is only a clergyman officiating within the House of Industry: but because in the judgment of the Commissioners he is a fit person to be appointed, and the rector and his curates, in the judgment of the Commissioners, are under the circumstances judged by them to be unfit. When I speak of the fitness or unfitness of these excellent clergymen to fill the office of chaplain to this Poor-house, I am happy to state that nothing in the remotest degree reflecting on the moral or religious character of these gentlemen is included in this discussion. The Commissioners have exercised their undoubted jurisdiction upon grounds of prudence and discretion only, and we cannot, if we would, control them.

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 POOR-LAW  
 COMMISSIONERS.

PERRIN, J.

I concur in the judgment, save that I give no opinion on the question whether Mr. Shore do or do not officiate within the parish.

MOORE, J.

I also concur, with the same exception as my Brother PERRIN.

T. T. 1853.  
*Queen's Bench*

April 26.  
 June 10.

In re DANIEL BRENNAN and others.

By the 3rd section of 12 & 13 Vic., c. 85, it is enacted that every man of full age, in occupation of a house within the borough of D., shall, if duly enrolled, be a burgess, provided that no one is to be enrolled unless rated in respect of the occupied premises to poor-rates, and unless he shall have paid on or before the 31st of August in each year all the rates specified in the schedule to the Act, as shall have become payable by him in respect thereof, except such as shall become payable within six calendar months before said 31st of August; and by c. 91, the Collector-General of taxes is directed to declare a poundage rate; and every such rate is to be collected, levied and paid by instalments, in case the Collector-General shall so think fit: and in case he shall determine that the rates shall be paid by instalments, he shall give notice to that effect; and from and after the publication of such notice, the rates shall be deemed due and payable. The Collector-General published a notice accordingly, declaring that the rate had been made, and declaring it payable by instalments on the 1st of January, 1st of April, 1st of July and 1st of October. *Held, per LEFROY, C. J., and CRAMPTON, J.,* that the entire of said rate should be paid on or before the 31st of August in each year, to entitle the rate-payer to be enrolled as a burgess. *Sed per PERRIN, J., and MOORE, J.,* the payment of the first instalment was sufficient for that purpose.

THIS case came before the Court on an appeal from the Court of Revision of the burgess-roll of the city of Dublin under the Municipal Corporation Acts. The Town-clerk of the borough of Dublin, in making out his list of the persons that he considered to be qualified to be put on the burgess-roll, inserted the names of Daniel Brennan and two others, the respondents in this matter. Martin the appellant had served a notice of an objection to each of those three persons being placed on the burgess-roll; and in the month of October 1852, that objection came to be adjudicated on before the Court of Revision—consisting of the Lord Mayor and two assessors—Edmund Hayes and Robert Mullen, Esqrs. The assessors differed in their opinion; and the Lord Mayor, adopting the opinion of Mr. Mullen, the objection was overruled, and those three persons were retained on the burgess-roll. Martin then obtained an order in this matter, which was in the nature of an appeal from the decision of the majority of the Court of Revision.

It appeared that on the 1st of January 1852, the Collector-General of taxes published a document in the *Gazette* and in the Dublin papers, stating the amount of the estimates furnished to him of the sums that would be required for the year 1852; and the poundage rate he had struck on these estimates, and the document then contained this passage:—"But in order to provide for the convenience of the rate-payers in such manner as is consistent with the public service, I do hereby, in the exercise of the powers

declare a poundage rate; and every such rate is to be collected, levied and paid by instalments, in case the Collector-General shall so think fit: and in case he shall determine that the rates shall be paid by instalments, he shall give notice to that effect; and from and after the publication of such notice, the rates shall be deemed due and payable. The Collector-General published a notice accordingly, declaring that the rate had been made, and declaring it payable by instalments on the 1st of January, 1st of April, 1st of July and 1st of October. *Held, per LEFROY, C. J., and CRAMPTON, J.,* that the entire of said rate should be paid on or before the 31st of August in each year, to entitle the rate-payer to be enrolled as a burgess. *Sed per PERRIN, J., and MOORE, J.,* the payment of the first instalment was sufficient for that purpose.

“in that behalf in me vested, under and by virtue of said Act, T. T. 1853.  
 “determine and declare that the said rate and assessment, and *Queen's Bench*  
 “also the said pipe-water rate and rents, for the respective *In re*  
 “purposes in that behalf above-mentioned, shall and will be col- BRENNAN.  
 “lected and received from the persons desirous to pay the same, and  
 “making due regular payment thereof, by four instalments, in the  
 “manner following, viz.:—the first instalment on and from the 1st  
 “of January instant; the second on and from the 1st of April; the  
 “third on and from the 1st of July; and the fourth on and from  
 “the 1st of October next.” It further appeared that the respondents  
 had duly and in sufficient time paid the first instalment; and it was  
 admitted that they had not paid any of the three last instalments;  
 and the objection taken to their being placed on the burgess-roll  
 was, the non-payment of the said three last instalments—the person  
 objecting contending that the entire poundage rate, consisting of the  
 four instalments, was payable on the 1st of January; and the re-  
 spondents, on the other hand, contending that only the first instalment  
 was so payable; and that as they had paid it they were entitled to  
 be placed on the burgess-roll. The majority of the Court of Revi-  
 sion decided with the respondents, and from that decision the  
 present appeal was brought.

The case was argued in Easter Term by—

*T. O'Hagan*, Sir *C. O'Loughlen* and *Lawrenson*, for the appellant;  
*Martley*, *Lynch* and *Dix*, for the respondents.

The following authorities were cited: *In re Bains* (a); *Fox v. The Overseers of Shaston* (b); *Forde v. Tweedy* (c); *The King v. Inhabitants of Ramsgate* (d); *The King v. Inhabitants of Great Bentley* (e); *Ford* appellant, *Snedley* respondent (f).

*Cur. ad. vult.*

MOORE, J., having stated the facts, proceeded to say:—

This question altogether depends on the construction of a very few sections of the statute 12 & 13 Vic., c. 91. June 10.

(a) 1 Com. Law Rep. 466.

(b) 2 Lut. Reg. Cas. 97.

(c) 20 Law Times, 96.

(d) 6 B. & C. 712.

(e) 10 B. & C. 520.

(f) 16 Jur. 1159.

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

Before I refer to that Act, I would wish to make a few observations on two antecedent Acts. The first I would refer to is 3 & 4 Vic., c. 108. The 30th section of that Act prescribes the necessary qualifications to enable a person to be put on the burgess-roll; and among other qualifications it requires the payment, on or before the last of August in each year of all poor-rates, grand jury and municipal cesses, and all rates and taxes which shall have become payable by him for the premises he occupies, "except such as shall become payable within three calendar months before such last day of August." The Legislature, in making this exception, had probably two objects in view—one, not to impose on the claimant of the franchise too large a burden in the payment of taxes as a condition precedent; the other object probably was, that the claimant should not be taken by surprise as to the payment of his taxes, because at that time the taxes were very numerous, imposed by different authorities, and in some instances uncertain as to the time of their imposition.

The next Act I would refer to is 12 & 13 Vic., c. 85, and by the 1st section it repeals the provisions as to the qualifications for being on the burgess-roll, as contained in the 3 & 4 Vic., c. 108; and by the 3rd section it enacts what for the future shall be the necessary qualification; and amongst other things, it requires the payment of all the rates and taxes specified in the schedule to the Act, as shall have become payable by the claimants, "except such as shall have become payable within six calendar months before the last day of August in each year." By this Act two important alterations were made; one which reduced the number of taxes, payable as to qualification, to seven; the other, which extended the exemption in the former Act from three to six months; and I think it plain that by this Act the Legislature had expressed a clear intention to lessen, instead of increasing, the qualification of payment necessary as a condition precedent to be put on the burgess-roll; for it diminishes the number of taxes necessary to be paid, and enlarges the exception from three to six months; and this clearly expressed intention should not, in my opinion, be lost sight of when we come to the

consideration of the next Act of Parliament, the 12 & 13 *Vic.*, T. T. 1853.  
c. 91, on the construction of which the question in this case will  
depend.

*Queen's Bench*  
*In re*  
BRENNAN.

Before this Act was passed, the taxes were collected by the different collectors appointed by the different bodies who had authority to impose the taxes; but by this Act, a Collector-General is appointed, and all taxes are vested in the Collector-General, and are to be levied and collected by him and under his superintendence. By the 30th and several subsequent sections, the different bodies who previously had the power of imposing taxes were directed, on or before the 10th of December in each year, to make an estimate of what they considered to be necessary in their several departments for expenditure during the next twelve months; and they were also directed to transmit, on or before said 10th of December, the said several estimates to the Collector-General. And by the 48th section, the Collector-General is directed, as soon as may be, after the receipt of such estimates, to make and declare a poundage rate, to be levied in respect of each of such estimates; and by the 51st section, every such rate is to be collected and paid by instalments, in case the Collector-General shall so think fit. And by the 52nd section, the Collector-General is directed, as soon as may be, after he shall have received such estimate, to publish in the *Gazette* and other papers a notice containing the estimates, the poundage rate which he has struck, and, in case he shall have determined on instalments, stating the days on which such instalments will become payable; and from and after such publication as aforesaid, the said rates shall be, and be deemed to be, due and payable.

It is on this section the objection is principally founded; and it is contended that, in the present case, the notice being published on the 1st of January, which is more than six months before the 31st of August, the payment of all the taxes was a condition precedent to the franchise of being put on the burgess-roll. If this construction is the right one, *all* the taxes must henceforward be paid before a party can be put on the burgess-roll; for unless the Collector-General neglects his duty, the notices of the rate must always be published more than six months before



T. T. 1853. the 31st of August. The estimates must be given to him on or before the 10th of December; he is bound to make the poundage rate "as soon as may be after that 10th of December." The making of the poundage rate is a mere matter of arithmetical calculation, and cannot require much time; and he is bound to publish his notice "as soon as may be after the said 10th of December;" and the necessary result is, that unless the Collector-General neglects his duty, the exception of the six months contained in the 12 & 13 Vic., c. 85, and to which I have already referred, can never have any operation, or confer any benefit or relief upon the person seeking to be on the burgess-roll.

*Queen's Bench*  
*In re*  
BRENNAN.

I have now to observe that the two statutes were passed in the same session, and they received the royal assent on the same day, the 1st of August 1849. I cannot bring myself to believe that the Legislature was guilty of the absurdity of giving by the Act, c. 85, the exemption of six months, manifestly intended as an increased boon and benefit to the persons seeking the franchise, and by an Act passed at the same time, rendering that exemption nugatory, and subsequently repealing it. If the Legislature has fallen into this absurdity, it is not for this Court to correct it; but I think we are bound to avoid that absurdity, if we can do so by another construction, if the words of the statute will fairly warrant it. After the fullest consideration in my power, I have come to the conclusion, that not only do the words of the statute warrant another construction, but imperatively call for it.

It is said that the Collector-General is not bound or compellable to declare that the taxes shall be paid by instalments; and it is alleged that if he does not do so, the six months' exemption contained in c. 85 will have no operation. It is quite true that the payment by instalments is quite discretionary with the Collector-General; but I consider him to be, as a public officer, intrusted with a discretion for the public benefit. I would consider him bound, in the honest discharge of his public duty, to declare instalments, if public convenience permitted it; and if from caprice or negligence, or for any political purpose, he abstained from doing so, though perhaps there would be no means of calling him to

account, I would consider him, as a public officer, justly open to censure and reproach; and therefore I think that the power given to the Collector-General of nullifying the exemption, by a refusal to declare instalments, does not furnish any fair ground for contending that where he does declare instalments, the six months' exemption is equally destroyed; and I have come clearly to the conclusion, that whenever the Collector-General does declare instalments, those instalments are only payable on the days specified in the notice; and that the burgess is not bound, as a condition precedent, to pay any of them that are made payable within six calendar months before the last day of August.

The 48th section, after directing the Collector-General to make a poundage rate, directs "that such estimates so apportioned, and "such rate or rates for each such year as aforesaid, shall be *due* "and payable in manner hereinafter mentioned."

In order to ascertain the time when the rate or rates shall be due and payable, we have to look to the subsequent sections; but before I do so, I must make an observation on the words in the 48th section, of "*due and payable*." They are not tautologous expressions, but are used to express the well-known principle of "*debitum in presenti solvendum in futuro*;" and they appear to me to have been purposely used to meet the case of instalments, the rate being due the moment the notice is published, but not payable except on the day specified.

The 51st section enacts "that every such rate shall be collected "and *paid* by instalments, in case the Collector-General shall so "think fit." This section appears to me to be direct legislation on the point. If a bill of exchange, addressed to a party, directs him to pay the amount on a specified day, surely *that* is the day on which the amount is payable, and not at any earlier period; so with regard to a promissory note, to pay at a future day. And since the Act directs that the rate shall be *paid* by instalments, if such be declared, I think it is a direction that the instalment shall be payable on the day specified for its payment. The 52nd section appears to me distinctly to support this view; for it enacts, "that in case the Collector-General shall determine

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

that the said rates shall *be paid* by instalments," he shall in his notice state the days upon which the instalments of such rates *will become payable*. For what purpose is that to be done, and why are the days to be stated? In order to show the time at which the obligation to pay would arise: the 52nd section then enacts, "that from and after such publication *as aforesaid*, the said rates shall be, and be deemed to be, due and payable." I think the fair interpretation of this latter clause is, that if nothing is said in the notice about instalments, the rates are due and payable immediately from the publication; but if, *as aforesaid*, instalments are declared, and days for payment of them specified, then from and after the said days respectively the said rates shall be payable. The 53rd section is, in my opinion, confirmatory of the same view. It provides, that before a distress should be issued for any rate, a demand must be made by a notice in writing, stating the poundage rate, and then it enacts thus:— "and in case the same shall be *payable* by instalments, the notice shall state the days upon which the instalments *will become payable*." I again ask, why state the days on which the instalments will become payable, as preliminary to the making of a distress, unless the Legislature considered that it was on those days alone that the instalments could be demanded or enforced by the collector?

I think the result of the several sections is, that a large discretion is given to the Collector-General as to how the rate is to be paid. He is bound to exercise his judgment on the subject, and act for the benefit and convenience of the public. If he considers that the public benefit requires the whole rate to be paid at once, he says nothing about instalments, and then the whole rate is payable at once; but if he thinks that a payment by instalments will answer the purposes of the public, he may so declare, and he is then bound in his published notice to declare the days on which such instalments will be payable. And then the 51st section declares that they shall be so paid; and in my opinion they are not payable at an earlier period than on the days specified. This construction will preserve to the claimant of the franchise the benefit of the six months' exemption expressly given by c. 85, and, as appears to me, is not only warranted by

the language of the Act, and conformable to its spirit, but is imperatively called for by the words which the Legislature has made use of.

T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

It has, however, been contended that this construction will enable the Collector-General to dispense altogether with the payment of any tax as a condition precedent to a person being placed on the burgess roll; for he has only to make all the instalments to be payable on days that would fall within the six months before the last day of August. In answer to this objection, I would say that the Collector-General is a public officer, of high responsibility, and it is not to be presumed that he will act in violation of his duty; and undoubtedly it would be a gross violation of his duty, if he was, from a political or other improper purpose, and to the prejudice of the public good, unnecessarily to declare instalments, and postpone the payment of them. And I cannot allow a presumption, which I ought not to make, to furnish any adequate ground for the construction of the Act. Besides, I would observe that the *actual payment* of taxes is not made by any of the Municipal Corporation Acts to be a condition precedent to the franchise, but only the payment of such as were payable. And I think it clear that if no tax had been imposed at all, or not imposed more than three months before the second of August, the person would have a right to his franchise, if duly qualified in other respects, although he had not actually paid a penny of any tax. For these reasons, my opinion is, that the cause shown ought to be allowed.

PERRIN, J.

I concur with my Brother MOORE, and I should be well content to abide by his clear and convincing judgment; but as there is a difference of opinion in the Court, and as the question is one of great importance as affecting the burgesses of Dublin and their franchises, I feel bound to state the grounds of my opinion.

I am of opinion that the appellant was and is entitled to be placed and continued on the roll of the burgesses of the city of Dublin, and that the judgment of the Court of Revision on this matter ought not

T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

to be disturbed, inasmuch as it appears that the appellant, being otherwise duly qualified, has paid, on or before the 1st day of August 1852, all such of the rates, cesses and taxes specified in the schedule to the 12 & 13 *Vic.*, c. 85, payable by (or from) him, as became payable by him (in respect of his house), before the last day of February in that year; that is, all such of said rates as had then (the 31st of August) become payable by him, except such as had become payable within the six months next preceding the said 31st day of August; and so complied with and fulfilled the requisites of the proviso in the 3rd section of that statute.

That section provides that from and after the expiration of the year 1849, every man of full age, who, on the 31st of August in any year, shall have been in occupation of a house, &c., within the borough during that year and the two preceding years, and been an inhabitant householder during that period, shall, if duly enrolled that year, according to the provisions of 3 & 4 *Vic.*, c. 108, and 6 & 7 *Vic.*, c. 99, be a burgess of Dublin: provided that no one is to be enrolled unless rated in respect of said premises to poor-rates during his occupation; and unless he shall have paid on or before the 31st of August all such of the rates specified in the schedule as *shall have become payable* (not due, but payable) by him in respect thereof, *except* such as *shall become payable* within six calendar months next before said 31st day of August. That exception of those words had and has some meaning. The Legislature thereby excepts such as *shall* become payable in the six months from the 1st of March to the end of August next preceding the day of payment; it supposes and implies that some may, some shall, become payable within that period, or why except them? Such an exception, variously expressed, occurs in several of the statutes regulating the borough franchises, municipal and parliamentary, in England and Ireland, couched in somewhat different, but nearly equivalent, terms, substantially requiring the discharge of all rates, beyond and except one half-year's amount, as in the Reform Act, 2 & 3 *W.* 4, c. 88, s. 5: it is, therefore, not unadvisedly adopted, but one recognised and found in the latest Acts, remodelled both as to England and Ireland. One object of this Act, as expressed in the preamble,

was, to assimilate the qualification of the burgesses of Dublin with those of England; and in 11 & 12 *Vic.*, c. 90—an Act passed in the session before—it is enacted, that no person shall be required, in order to entitle him to have his name inserted in any list of voters for any city, town or borough in England, to have paid any poor-rates or assessed taxes, except such as shall have become payable from him previously to the 5th of January in the same year. That was an express general enactment passed in England; and this Act, having been passed in the following session for the same purposes, contains the provision I have referred to. I therefore consider these words are to have the same meaning—the object being to assimilate the law in England and Ireland; and also as an ordinary test of solvency.

T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

In order to ascertain what were all such (those) rates, cesses and taxes, as became payable by him on or before the 31st of August, and how much thereof fall within the exception (or boon), and became payable the preceding six months, we must refer to the provisions of c. 91, passed in the same year, and to what has been done under it; as on its provisions the question mainly depends.

It is entitled an Act to provide for the collection of rates in the city of Dublin; and its object was to make all the rates payable and collectable by one person, and under his direction; and it confers on him the powers of the several boards. The first important section is the 48th; the Collector-General is thereby to declare the poundage rate to be levied in respect of each estimate, and such estimate so apportioned shall be due and payable in manner thereafter mentioned. The 51st section then provides that every such rate to be collected and levied shall be collected and paid by instalments, in case the Collector-General shall so think fit. The object of the enactment is precise and express; there is nothing doubtful in it, and the change of expression in that section is worthy of observation—that it is to be *paid* by instalments, if the Collector-General shall think fit: and yet it is said, though it should not be paid, it is payable—payable means to be paid; to be paid on a certain day means payable on that day. Then, by the 52nd section, in case he shall determine that the said rates shall be paid by instalments, he

T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

shall give notice, stating the amount of estimates respectively, and of the poundage upon the yearly value of rated property in respect of each rate for the current year; and in case he shall determine that the said rates shall be paid by instalments—stating the days on which the instalments of such rate will become payable—and from and after such publication as aforesaid, the said rates shall be deemed to be due and payable.

The Collector-General did call for the respective estimates, and received them, and assessed and declared the poundage on each estimate, and the rate which was to become *due and payable in manner in the Act mentioned*, and did give public notice thereof in the *Gazette* of the amount of the estimates respectively, and of the poundage for each rate; and (having determined that the said rates should be paid by instalments), of the days upon which the instalments were to become payable—viz., the 1st of January, 1st of April, 1st of July, and 1st of October; whereby and whereupon it is said that the said rate (which the collector, in the exercise of his duty, determined to be payable by instalments, that it was fit that it should be so upon the publication thereof, and of the days specified for and when the instalments would become payable), the whole sum, the four instalments, then and there became and was, not payable by instalments on those days, but immediately due, and payable *eo instanti*—in the teeth of the notice and the enactment in the 51st section, that the rate should be collected and paid by instalments. There is no reliance on language if this be so—that it shall not be payable according to the notice and publication, but in defiance and contradiction thereof; and it is gravely asserted, that to hold otherwise is to add to and interpolate the word “accordingly.” This, in my judgment, is a violence to all rule, a violation of the sanctity of a solemn enactment of a statute, and contrary to its true construction. If the word “accordingly” were added, the tautology supplied, there could not be room for what I can call nothing but a quibble. That the Collector-General did give notice, stating the amount of the estimates, and stating the days on which the instalments would become payable, has not been disputed, nor can be—though the phraseology is rather inflated and pompous—that such is the mode of declaring

and announcing his determination that the rates will be paid by instalments: all that seems to be insisted is, that they, the same rates, are payable by four instalments; and yet they are payable in one gross sum on the 1st of January—that they are payable in fact by instalments; but in imagination or in law on the 1st of January—that for all practicable purposes they are payable, leviable, collectable and enforceable by instalments only; but yet for a quibble or a trick, a device to defeat the Act, to disfranchise the citizens of Dublin of their municipal franchise, they must be supposed to be payable, when by no power or process they can be made payable.

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

This brings me to the consideration of the 53rd section, upon which this enigma is begotten. It enacts that, before any rate shall be deemed due, for the purpose of enforcement, that is, for the purpose of making it paid or payable, a demand thereof shall be made by notice on the premises of their valuation—the poundage of each rate and its amount, and the amount charged or claimed thereon, and the days on which the instalments will become payable (in case it is payable by instalments), signed by the collector; and this is directed to be as near as may be to a form where no instalments, or days for payment of instalments, are mentioned; and it is enacted, that a receipt from any collector to receive the same shall be a sufficient acquittance. This is to be read in connection with the 52nd section and the preceding enactment, that after the publication of the days on which the instalments will become payable, they shall be, and be deemed to be, due and payable accordingly; yet before they shall be, or be deemed due, for enforcement, and leviable by distress or otherwise, a formal and full demand in writing, specifying all the various particulars on which the amount and legality of the demand depend, shall be left at each house, and in case the same shall be payable by instalments, the days on which they will become payable; that is, that notwithstanding the enactment of the 52nd section, that the instalments should be, and be deemed to be, due and payable upon the publication of the notice stating the days of payment; yet before they shall be enforced, and be or be deemed due for enforcement, or actually payable, this full and specific notice shall be given. This



T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

section and the provisions of the 70th section appear to me to contain an enlargement of the times of payment of the instalments beyond the days on which they were by the 52nd section to be and deemed to be due and payable, to enable each occupier to be satisfied of the justice of the demand upon him (of this complicated rate), and no more. I cannot see in the phrase, "before any rate shall be or be deemed due for the purpose of enforcing the same," any thing to denote or declare that the day of payment was past, that it was payable long before, that it was payable in one gross sum on the 1st of January, where the very section says, "and in case the same shall be payable by instalments, the days on which they become payable." It appears to me as plain as language can speak, to express a rate payable by instalments on the 1st of January, 1st of April, 1st of July, and 1st of October, therefore not in gross, and not one payable on the 1st of January; and I cannot hold myself at liberty to impute such a meaning to the Act of Parliament, and call it construction. I know not where the evil consequences would end.

I hold that the rates of 1852 were payable by the citizens of Dublin on the 1st of January, 1st of April, 1st of July, and 1st of October; that they could not become payable before those days; that a rate is not payable until it becomes payable; that the rate or instalment which was to become payable on the 1st of April and 1st of July was not payable on the 1st of March; that neither it, nor that which was to become payable on the 1st of October, was payable six months before the 31st of August.

The Collector-General, in his notice published the 2nd of January 1852, states the estimates and poundages, and declares that "It is fit and necessary, in order to provide for the public service, that same should be made, and that same is (hereby declared) to be due and payable from publication hereof, in manner by said Act directed; but in order to provide for the convenience of ratepayers in such manner as is consistent with public service, I do hereby, in exercise of the powers in that behalf in me vested, and by virtue of said Act, determine and declare that the said rate and assessment, and also proportionate rate and rates, will be collected and received from the

“persons desirous to pay the same, and making due and regular  
“payments thereof accordingly, by four instalments, in manner fol-  
“lowing, that is to say, the first instalment on and after the 1st of  
“January, the second on the 1st of April next, the third on the 1st  
“of July, and the fourth on the 1st of October next; and that in  
“case of default in payments of any one of such instalments before  
“the day hereby fixed for payment of the next, the entire of the  
“rates shall and will be levied and enforced in the manner by law  
“directed.”

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

The Collector had no authority to qualify his determination or decision that it was fit that the rates should be collected and paid by instalments, nor to add to the modes of enforcement of payment provided by the statute; nor to add any penalty to the default of payment of any instalment, or to accelerate thereon the payment of any other sum or instalment; nor can he leave it in doubt or uncertain at his option; his statement of the days on which the instalments will become payable is a determination which he cannot revoke or counteract, and make the contradictory rule of payable at once *in toto*, and again by instalments.

I think the respondent, having on or before the 31st of August paid all such of the rates specified in the schedule of c. 85, which became payable by him (the instalment of January) on or before that day, except what became payable within six calendar months next before it (the instalments of April and July), being otherwise duly qualified, was entitled to be enrolled on the burgess list, under and pursuant to the 3rd section of chapter 85.

This opinion and judgment I rest upon the enactments I have referred to, direct upon the matter; but as reference has been made to some others in the argument as affecting the question, and, as it is said, militating against this view, I shall examine them and their bearing upon the matter.

The first in order is the 70th section, enacting that if any one rated to any of the rates or rents fail to pay any of the said rates due from him, for fourteen days after demand in writing by the collector, any Justice of the Peace may summon him to appear and show cause why the rates due from him should not be paid; if no cause shown,

T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

the Justice of the Peace may issue a warrant of distress, or collector may recover same by action of debt or civil-bill. What does that amount to? That if any one fail to pay *any* of the said rates *due* from him, for fourteen days after demand in writing, he may be summoned to show cause why the rates *due* from him should not be paid, and shall be liable to distress or action. That does not show that the whole rate is *due*, and may be demanded in January and levied in January or February; it rather distinguishes what is due.

But reference is made to the schedule, which is said to deal with the whole sum assessed by certain rate or rates. The first inquiry here is, can it be considered as any part of this Act as passed? and was it not prepared and framed for a bill of a different character and complexion? The bill for the collection of rates in the city of Dublin, as originally prepared and brought in, had no provision for the payment by instalments, but provided for early payments by allowance of discount for prompt payments, and the assessments or rates were made by the boards or bodies empowered under the respective Acts under which authority is given to make the rate; not this Act certainly, as the direction—[*Here name the Act under which authority is given to make the rate or rates*—]proves, for just before the complaint is recited to be made by the collector under an Act intituled—[*Here insert title of this Act*—]and the rate is said to bear date in 184—, whereas this Act did not commence or take effect until the 5th of September 1850. Again, this schedule is prepared not for the borough of Dublin, but for a county or borough in general. This schedule plainly does not belong to and is no part of the Act. The words “duly demanded in writing by him from the said ——” must mean according to the provisions of section 58; and in this case, where the rate is payable by instalments, must contain the days when the instalments would become payable.

It cannot be contended or argued that the words payable by instalments do not mean payable by instalments; nor if payable by instalments, that the instalment payable in July or October could be recovered or was due, and legally and duly demandable in April, or due for enforcement on that day. The warrant under sections 70 and

71 cannot be in the form and to the effect in schedule C. I therefore cannot pronounce this schedule as of any value or bearing on the question. It is plainly blundering and confused, and manifestly does not contemplate or provide for any payments by instalments, a very important provision of the Act, as affecting the less wealthy rate-payers. It, as well as schedule B, was not framed for this statute as enacted; therefore section 70 in no manner affects or varies the construction and import of section 53 and those from 48, and the inference and result they necessarily afford. .

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

The next section to which attention has been drawn as proving the position contended for is section 73. Does that prove that the instalments are due or recoverable before the days? or payable before they are payable? *the rates then payable*. What is then payable? Can it be contended that if he pays the first instalment, and quits on the 25th of March when his term ends, he may be compelled to pay the instalment, payable on the 1st of April, nay, July and October? that they are payable *then*, contrary to the 52nd and 74th sections? Therefore in my judgment, these latter sections, so far from being inconsistent with, or militating against, or impugning the doctrine or construction plainly expressed by the former provisions of the Act, appear to me to sustain, enforce, and confirm it. The authorities which have been referred to do not govern the question one way or the other, nor furnish any analogy beyond or equal to the plain words of the statute.

I further think, as I before intimated, that the construction contended for and sought to be imposed on chapter 93, not only renders the provisions of the Act self-contradictory and inconsistent, but annuls the exception in section 3 of c. 85 (*except such as shall become payable within six months*), and renders these words meaningless or illusory; it strikes them out of the Act. If none can become payable within those six months, or after the 2nd of January, surely some consideration, some hesitation, is required before we presume to do so. The respondents therefore, having paid all the rates which became payable, are entitled to be enrolled on the burgess list.

CRAMPTON, J.

In this case my opinion is, that the decision of the Revision

T. T. 1853. Court was erroneous; and the only doubt I entertain as to the correctness of that opinion is, that I have the misfortune to differ from my Brethren who have just preceded me; but, on the other hand, I have great satisfaction in being authorised by my Lord CHIEF JUSTICE to announce that his Lordship entirely coincides with me in opinion, and in the grounds upon which that opinion is founded. Those grounds I shall now proceed to state.

*Queen's Bench*  
*In re*  
BRENNAN.

The case turns upon the construction of the statute 12 & 13 Vic., c. 91. Under that statute, in January 1852, a rate was laid by the Collector-General upon the borough of Dublin. His duty is, by that statute (section 2), "to applot, collect, levy and receive the rates," &c. The Collector-General made (as he was authorised by the statute to do) that rate payable by four instalments: the first instalment payable immediately; the second on the 1st of April 1852; the third on the 1st of July 1852; and the fourth on the 1st of October 1852. The respondents, on the 1st of June 1852, paid the first instalment only, leaving the others unpaid. In November 1852, the respondents claimed to be put on the burges roll. This claim was resisted, on the ground that the payment of the whole rate was a condition precedent to their being placed upon the burges roll. The respondents contended that the payment of the first instalment satisfied the exigency of the first statute, viz., the 12 & 13 Vic., c. 85. The majority of the Court decided in favour of the respondents—Mr. Hayes dissenting.

By that statute (c. 85), no person can be enrolled unless he has paid all rates, &c., payable by him in respect of his occupation, except those which became payable by him within six calendar months before the 31st of August in each year, i. e., before the 1st of March. On the one side it is contended that the payment of the first instalment in this case entitled the respondents to be enrolled, inasmuch as the other instalments were all payable within six calendar months before the 31st of August, and all of the rate due according to the statute had been paid. On the other side it was contended that the whole rate was due and payable by the respondents at once, though it was enforceable by the Collector-General only at the periods fixed for payment of the instalments. In fact

the respondents' argument is, that each instalment was a separate debt: the appellant's is, that there was but one debt, viz., the rate; but that debt was made payable by instalments, *debitum in presenti solvendum in futuro*; or, in other words, that the term "payable" has here two applications—payable at once for the purpose of the franchise—payable at the instalment periods for the purpose of enforcement. And this appears to me to be the true construction of the statute, and to have been plainly the intention of the Legislature.

We were reminded by the respondents' Counsel that the two statutes 12 & 13 Vic., cc. 85 & 91, were passed on the same day; and it was argued that they should be read together as one statute, or at least as part of one code, in order to decide this question. It is true that these two statutes, along with fifteen or sixteen other statutes, did receive the Royal assent upon the same day. That they should be both read to decide this question, there can be no doubt; but they should be read intelligently, and not, as has been contended, as if they formed parts of one statute. They are not parts of one statute, or even of one code; but each is a part of a totally distinct code, passed with different objects and for different purposes. Chapter 85 is part of the municipal code: chapter 91 is a consolidation and amendment of the different Acts for the collection of rates in the city of Dublin. One Act, c. 85, amending former Acts, regulates the qualification of burgesses, and does not touch the subject of collection; the other regulates the mode of collecting rates in the city of Dublin, and does not touch on qualification. The payment of rates, as one of the conditions for being enrolled as a burgess, is the only link that connects the two Acts. It was said that there was an enactment that these two statutes should be construed together as one Act; but that is a mistake. The section referred to as containing such an enactment, viz., section 20, c. 85, does no such thing; it requires that the new Municipal Act, c. 85, shall be in force along with the former Municipal Acts to which it refers, and be construed along with them as one Act. By this Act, c. 85, occupation and payment of rates are the two great conditions for enrolment—the two great tests of title to be

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

a burgess. And one of my objections to the construction put by the majority of the Revision Court upon these statutes is, that it goes far to do away with one of these tests altogether, viz., the payment of rates.

But to proceed; c. 85, section 3, enacts, that no person shall be put upon the roll unless he shall have paid, on or before the 31st of August in each year, all his rates, except such as shall have become payable by him (if any) within six calendar months next before the 31st of August; and observe, payable under this Act, and due and payable are the same; this Act plainly does not contemplate payment by instalments.

Chapter 91 consolidates all the rates, makes all payable at the same period, and collectable together; sections 48, 51, 52 and 53, are those upon which the question in this case turns: by section 48 the estimates and rates shall be *due* and *payable* in manner thereafter mentioned, referring, no doubt, to sections 52 and 53, which make the rates to be due as in section 52, and to be collectable as in section 53. By section 51 a power is given to the Collector-General to make the rate payable by instalments; this power he may or may not exercise, at his discretion. In this instance he has exercised the power; had he not done so, the question could not have arisen, since in that case the whole rate would not only have become due and payable immediately, but collectable at once after the notice required by the statute. The 52nd section requires the Collector-General to give public notice of the amount of the estimates for the year, and of the poundage rate; and in case he determine that the rates shall be paid by instalments, he is to state in the public notice the days upon which the instalments shall become payable; and then come the enacting words applicable to all cases of payment, whether by instalments or at once:—"That from and after such publication, the said rates shall be, and be deemed to be, due and payable." The construction of the Court below would repeal this last enactment, and substitute for it that the rates shall be due and payable, not at one period, or from publication, but at separate periods, and from the instalment days. The 52nd section thus provided for the period at which the tax became pay-

able in law, when the Collector-General might receive it, and the occupier have a right to pay it. The 53rd section provides for the period when the tax shall be, or be deemed, due and payable, *for the purpose of enforcing compulsory payment*, whether payable by instalments or not; and it enacts that a previous demand and particular notice must be made and given to the occupier.

T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

Here, then, *i. e.*, between these two sections, 52 and 53, a plain distinction is made—the tax, the whole tax, by section 52 becomes payable in law, from the publication of the public notice; by section 53 it becomes enforceable against each individual occupier, in fact, only from the service of the individual notice. And we observe that the word “payable,” in these sections has two applications: namely, to the rate and to its instalments. The rate is payable from publication and notice; and when “to be paid by instalments,” the instalments are payable from notice. It is by confounding these two applications of the word “payable,” that the difficulty has been created, and by confounding rates with instalments. The rate is payable, and the instalments are payable, *debitum in presenti solvendum in futuro*. For the ease of the occupier, and to give him the franchise, he must pay the whole rate; for the ease and accommodation of the poorer occupier, he may pay by instalments. This is the natural and fair import of these sections. The other construction makes the 52nd and 53rd sections contradict each other, and requires either violence to be done to the language of the Act, or words to be interpolated. Thus, Mr. *O'Hagan* argued that “payable under this statute” and “enforceable,” meant the same thing, notwithstanding the contrasted terms of sections 52 and 53, which contrast exists *whether there be instalments or not*; and Sir *Colman O'Loughlen* was obliged to call upon us to read the 52nd section, with the added words at the end, “*according to the terms of such notice*,” which would be absurd if the rate was not made payable by instalments. Now, what right have we to add these words? None, unless, indeed, we give way to the vague and unsatisfactory argument, that it is the duty of the Court to lean



T. T. 1853.  
*Queen's Bench*  
*In re*  
 BRENNAN.

in favor of the franchise, the meaning of which seems to be, that we are to create a doubt out of plain language, on that doubt to enlarge the franchise.

I think we have nothing to do with the doctrine of the necessity of enlarging the franchise. I may concede to some of our sages the blessings of universal suffrage (though personally I abhor the absurdity), without receiving from it any help to the interpretation of this Act of Parliament. It is our duty to ascertain the intention of the Legislature, and so interpret the statute as to give the franchise to every one to whom, by the Act, it was intended to give it, and give it to none from whom it was by the Legislature intended to be withholden; and I deduce the intention of the Legislature from two sources. First, from the plain terms of the statute, giving, as I humbly think, an unmistakeable meaning to these words. Secondly, from the absurd and mischievous consequences which would flow from the construction contended for by the respondents' Counsel. By that construction, an invincible and dangerous power is put into the hands of the Collector-General. He can at his pleasure increase or diminish the number of borough voters, and thus in a great degree influence the result of the municipal elections. If he make no order that the rate be payable by instalments, then the rate becomes due immediately on publication of the notice, and all the occupiers are on the same footing; the whole rate must be paid to entitle to the franchise. If he order the sum payable by instalments, he can fix the terms and the amount of the instalments and the proportions for payment at his pleasure. In the present instance the payment of the first instalment, according to the argument, qualifies the occupier for the franchise, because the first instalment only is payable immediately, the remaining three not until within six months before the 31st of August; but he might have made the rate so payable by instalments, that the occupier should be entitled to be enrolled for the payment of any rates at all. Thus, suppose the first instalment had been payable on the 1st of April, then all the instalments would fall within six months before the 31st of August. So that this construction is to give the Collector-General the extra

power of increasing and diminishing the number of the borough voters at his pleasure; and further, the power of dispensing at his will with one of the two tests and conditions appointed by the Legislature as precedent to the right to be enrolled, viz., the condition of paying the rates. Thus he can at his option dispense with the test of payment of rates altogether, or make it a condition precedent, or take a middle course. It is said, we cannot presume that a public officer will abuse his office for such a purpose: but that is not the question; but whether the Legislature intended to confer the power. I have no doubt that the power may be as safely vested in the hands of the present Collector-General as in those of any other gentleman; and I am sure in fixing the instalments on the present occasion, the Collector-General had no intention in any degree to interfere with the constituency of the borough; and that is the more manifest, because it is plain that the Collector-General's construction of the statute is the same as that for which I contend, *that appears on the face of his notice*; and I am strongly disposed to think that, had he foreseen the construction now contended for, he would not have made the rate payable by instalments.

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

But the question is, did the Legislature intend that such a power should be given to the Collector-General? Consider his office; he is merely a collector of rates, a substitute for the numerous collectors theretofore employed. He is a government officer, holding his place during pleasure, and dismissible at the pleasure of the Crown. Now, observe on this point the jealousy of the Legislature as to the interference of this officer in elections. By the 24th section of this statute, c. 91, the Collector-General and his officers are prohibited, under severe penalties, from voting or taking any part in the election of Members of Parliament for the city of Dublin. And yet the construction contended for by giving him power in a considerable degree to mould the borough constituency, enables him indirectly to exercise an influence over the parliamentary constituency; for, though not co-extensive, these two bodies must be to a large degree the same. Can it then, I say, be for a moment supposed that the Legislature ever contemplated giving to the Collector-General such a power as that to which I have adverted? And yet the con-

T. T. 1853.

*Queen's Bench**In re*

BRENNAN.

struction contended for leads to that conclusion. His duty is to applot, collect, levy and receive (see section 2).

A case was cited as bearing upon the present question, and upon by the Counsel upon both sides, the case of *Smedley (a)*; that case, however, gives us but little assistance in deciding the present one. It is decided upon the English Acts of the 11 & 12 Vic. c. 90, and the prior Acts of 43 G. 3, and the 48 G. 3, c. 141, Acts differing considerably from the Irish statutes. However, *Ford v. Smedley* has furnished an argument upon each side. The respondents rely upon it as showing that the payment of instalments short of the whole assessment is sufficient to entitle the party to the franchise; and the appellant relies upon it as showing that there may be two periods for payment, one for voluntary payment, in order to obtain the franchise, another for compulsory payment by distress. And the case bears out both these positions; and it appears in this, that by the provisions of the English statute it is first an assessment, by which, however, no debt is created, and the assessment is to be paid by four fixed quarterly payments, and each of these instalments is a separate debt, for which a separate warrant issues, and is made recoverable as a debt. By the 48th G. 3, this assessment is collected and levied by distress at times specified in the Act. By the 11 & 12 Vic. c. 90, a person cannot be on the list of voters unless he has paid, on or before the 5th of July, all poor-rate and assessed taxes, payable by him at that time. In the case cited, the party had paid the first quarterly instalment, but not the second, which was held that he could not be registered, not having paid the second instalment, although the whole rate was, by the 11 & 12 Vic. c. 90, made payable so as to be enforceable only half-yearly. I observe that the English Acts vest no such power as that given for the Collector-General under the Irish statute in this case. It seems to me, therefore, if this invidious power is by this instruction to be given to the Collector-General, that he will exercise it discreetly by not making the rate at any time payable

(a) 16 Jur. 1150.



ments; or if that be not so, that the Act should be amended as soon as possible.

T. T. 1853.  
*Queen's Bench*  
*In re*  
BRENNAN.

To the objection that the exception of six months in c. 85 would be nugatory, I answer thus:—First, I have already suggested that the two Acts have two totally different objects—c. 85, to regulate qualification—c. 95 to regulate the collection of rates. But c. 85 was modelled upon the previous municipal Acts, and adopts their language; c. 95 had reference only to the collection of the rates. Secondly, the Act is by no means nugatory; the substance of it is carried out by c. 95; c. 85, exempting from the payment of all rates becoming payable within the six months before the 31st of August in each year, allows to each ratepayer a period of six months for payment of the rate; c. 95, making the rate payable in January, whether collectable by instalments or not, allows the ratepayer nine months for the payment of his rate. Thus in the enactments, though there is a literal variance there is a substantial unity, and we should remember also that c. 85 as well as c. 91 requires not a portion or portions, but the whole of the rate to be paid, to give title to the franchise.

I regret extremely the absence of the CHIEF JUSTICE upon this occasion. I know his Lordship was desirous in the strongest terms to state his full concurrence in the opinion and views which I have now more feebly expressed; and his desire is still to have an opportunity of publicly stating his opinion upon this most important subject. The absence of the CHIEF JUSTICE can, however, make no change in the rule to be pronounced. Were his Lordship here, the Court would be equally divided; and in such a case the course is, that the cause is not allowed, and the conditional rule stands discharged. Therefore discharge the conditional rule, and no costs.

M. T. 1853.  
*Exch. Cham.*

*Exchequer Chamber.\**

[REGISTRY CASES].

M'NIFFE, . . . . . *Appellant;*  
 M'TIERNAN, . . . . . *Respondent.*

Dec. 8.

A notice of claim to be rated in respect of premises qualifying as a voter under 13 & 14 Vic., c. 69, sec. 110, is sufficient if signed with the name of the claimant, in the handwriting of another person, by the authority of the claimant.

This case had been reserved by the Assistant-Barrister of the county of Sligo, at the Registry Sessions of that county, and involved the question, whether a person, claiming to be rated to the relief of the poor, should himself sign his name at foot of the claim, or whether that signature being made by another person for him was sufficient; the name of the claimant was in the handwriting of his attorney, and the Assistant-Barrister ruled that it was sufficient, within the Registry of Voters Act, 13 & 14 Vic., c. 69, he having authority from the claimant so to do.

*D. Lynch* (with him *Jones*), for the appellant.

The objection here was, that notice of the claim was not signed by the respondent himself.—[MOORE, J. The Assistant-Barrister states it was done by the claimant's authority].—The claim is regulated by the 110th section of 13 & 14 Vic., c. 69, which enacts, "That it shall be lawful for any person who shall occupy any lands, tenements or hereditaments, rated under the Acts for the relief of the poor, and whose name shall have been omitted from the rate, to present to the guardians of the union a claim to be rated in respect of such premises; and such claim shall be in writing, and signed with his name;" the claim under that section ought therefore to be in the handwriting of the applicant, and signed by him: *Toms v. Cuming* (a).—[MOORE, J. There is a reason

(a) 8 Scott, N. P. 910.

\* *Coram* PERRIN, BALL, JACKSON and MOORE, J.J.

why a party objecting should appear in person; but that is different from the case of a person putting in a claim. The Court should lean in favor of the franchise, rather than against it.]

M. T. 1853.  
*Exch. Cham.*  
M'NIFFE'S  
CASE.

*Napier* and *Hemphill*, contra, were not called on.

PERRIN, J.

In this case we affirm the decision of the Assistant-Barrister, with costs. The notice of claim was signed with the name of the claimant; that is sufficient within the words of the Act of Parliament, which does not require the notice to be signed by the individual himself.

Decision affirmed, with costs.

WILLIAM BRADY, . . . . . *Appellant*;  
PERCEVAL RYAN, . . . . . *Respondent*.

Dec. 8.

THIS was an appeal from the decision of one of the Revising Barristers (Shaw) for the county of the city of Dublin, at the Revision Court, held on 17th of September 1853.

It appeared that at the Court of Revision for the county of the city of Dublin, Perceval Ryan, of No. 45 Lower Mountpleasant Avenue, whose name appeared on the list of voters (Freemen's list, No. 9), objected to the name of William Brady the appellant, of 5 North King-street, being retained on the list No. 7, of persons entitled to vote in the election of representatives for the city. Brady was entered on that list as the rated occupier of lands, &c., and in the list the description of the premises rated was "house No. 5 North King-street." In the rate book the premises were described as "No. 5 North King-street, four-story house, small yard, value £15." He had

A yearly tenant of rated premises let the shop and adjoining parlour, part of the premises, to a stranger, at a rent; a door opened from the shop into the street, through which the occupier had ingress and egress, and had exclusive control over it; a hall-door opened into the same street, and a passage led from it through the house to

back premises; a door opened from the parlour adjoining the shop into this passage; the yearly tenant occupied the upper stories of the house, and his mode of ingress was through the hall-door.—*Held*, that the occupation of the upper stories was not an ownership or occupation of the entire of the rated premises, within the meaning of 13 & 14 Vic., c. 69, s. 5.

M. T. 1853.  
*Exch. Cham.*  
BRADY'S  
CASE.

for some years held the entire premises under his immediate landlord as tenant from year to year. Some time previous to the 20th of July 1853, he let the shop and adjoining parlour, portion of the rated premises, at a yearly rent, to a person who had since occupied the same and resided therein. There was a door opening from the shop directly into the street, through which the occupier of the shop had at all times free ingress and egress, and over which he had exclusive control. There was also a hall-door to the house, which opened directly into the same street, and a passage leading from the hall-door through the house to a back-door opening into the yard; and a door opening from the parlour adjoining the shop into this passage. William Brady had, since 20th of July 1852, resided in and occupied the three upper stories, to which his mode of ingress and egress was through the hall-door.

The Barrister decided that the occupier of the shop and parlour had exclusive occupation of that portion of the rated premises as tenant to Brady, and not merely as a lodger; that Brady therefore did not occupy the entire of the rated premises, within the meaning of 13 & 14 *Vic.*, c. 69, s. 5, and allowed the objection, without costs; and expunged the name of Brady from the list No. 7.

*Hyndman and W. W. Brereton*, for the appellant.

*Coffey*, for the respondent.

*Per Curiam.*

This appeal must be dismissed, as we do not think that the occupier of the shop in question was a mere lodger.

M. T. 1853.  
*Exch. Cham.*

BOON, . . . . . *Appellant ;*  
 MOFFATT, . . . . . *Respondent.*

BOOTH, . . . . . *Appellant ;*  
 MOFFATT, . . . . . *Respondent.*

Dec. 8, 12.

THESE were also appeals from the decision of the Revising Barrister for the county of the city of Dublin, in September 1853. In both cases the name of the appellant was inserted on the Town-clerk's list, according to the form in schedule No. 12, annexed to 13 & 14 *Vic.*, c. 69, pursuant to a notice of claim, and the qualification stated was "leasehold, £10 house." No objection had been served on or made to the appellant being retained on the list; and upon reading the list in open Court, the respondent, for the first time, objected to the name of the appellant being retained on the list, inasmuch as he did not appear by himself or any other person in support of his claim; and the Barrister decided that he had jurisdiction to require the appellant to give *prima facie* evidence of his right to have his name inserted on the list; and in default of his doing so, he expunged the name.

In Booth's case the notice of claim was not in the handwriting of the appellant, and the Barrister, considering the notice of claim insufficient, expunged his name.

On revision of the lists of persons claiming to be entitled to vote at elections, when no objection has been served on a claimant, and none made:—*Held*, that the Assistant-Barrister has no jurisdiction to require the claimant to give evidence of his right to have his name inserted on the list.—*Held also*, a claim to be registered for a city or borough need not be signed by the claimant personally.

*Brereton* and *Hyndman*, for the appellants.

Under the 55th section of 13 & 14 *Vic.*, c. 69, the Barrister had no power to inquire into the validity of a claim, in the absence of objections by parties qualified to object, unless the claimant be dead, or there be a duplicate entry. The interval directed by the Act to elapse between the last day for serving the notice of claim, namely the 4th of August, and the last day for making objections (the 20th of August), shows that the statute contem-



M.T. 1853.  
*Exch. Cham.*  
 BOON'S  
 CASE.

plated notices of objections being served in every case. As to the notice being in the handwriting of the claimant, the Court has already decided that was not necessary.

*Coffey and P. O'Brien, contra.*

The Revising Barrister has an inherent power of inquiring into the validity of claims, without any objection being served. The 56th section of 13 & 14 *Vic.*, c. 69, gives power to examine all parties, whether claiming or objecting, or objected to; and all persons whatsoever may be examined upon oath touching the matters in question, and the Barrister is to determine upon the validity of such claims and objections, and is to have the same powers and proceed in the same manner as under the provisions of the previous Registry Act, 2 & 3 *W.* 4, c. 88. Notices of claims must be put in before the 4th of August, though they need not be published until the 11th of August, and there is thus little time given for the public to be acquainted with the claimants. The 53rd and 54th sections are important, as if a claimant be omitted in the list he may get his name placed on it, and objectors may oppose by giving notice in writing to the Barrister.—[BALL, J. The 53rd section aids the omission of the Town-clerk, and enables a claimant to secure the franchise, who might by such omission be deprived of it; and the 54th section enables an objector to oppose such omitted claim.]

As to signature to a notice of claim, the 22nd section requires a notice of claim to be signed, and all new claims to be made "by him signed;" and the 34th section, dealing with boroughs, though it omits these words, yet is to be taken in connection with the 22nd section. In *Toms v. Cuming* (a), it was ruled that a notice of objection must be personally signed by the objector.—[BALL, J. The point is not arguable. The 34th section omits the words "by him signed," which are in the 22nd section—why should we say that they ought to be in the 34th section?]

*Cur. ad. vult.*

(a) 8 Sc. N. R. 910.

PERRIN, J.

In these cases of *Boon v. Moffatt*, and *Booth v. Moffatt*, we feel bound to reverse the decision of the Barrister, and restore the names expunged by him. The Assistant-Barrister is not authorised to consider the grounds of a claim where there is no objection taken. Except in the precise cases specified in the Act of Parliament he has no such authority; something, however, should be done to remedy the abuse that may result from this state of the law.

M. T. 1853.

*Esch. Cham.*BOON'S  
CASE.

Dec. 12.

PERCEVAL RYAN, . . . . . *Appellant;*  
PATRICK BATES, . . . . . *Respondent.*

Dec. 12.

THIS was also an appeal from the decision of the Barrister at the Dublin Revision Court. The name of the respondent appeared on the Town-clerk's list No. 7; and it appeared by the entry that his place of abode was 81 Manor-street. The description of the premises was "House 81 Manor-street—rating £9." The respondent had occupied the entire of those premises for twelve months previous to the 20th of July 1853, as tenant within the meaning of the 5th section of 13 & 14 *Vic.*, c. 69. On the 10th of December 1852, the Guardians of the North Dublin Union estimated the amount chargeable on the electoral division for twelve months next following the 1st of January 1853, at £21,000, and certified and transmitted same to the Collector-General of rates of said city, who shortly after, in pursuance of the provisions of 13 & 14 *Vic.*, c. 91, ascertained the poundage rate to be levied in respect of the poor-rate upon the yearly value of all premises within the said electoral division, to be

The Collector-General of Rates for the borough of Dublin declared the poundage-rate payable and leviable in respect of the poor-rate, and signed the entries thereof in the rate book, pursuant to 12 & 13 *Vic.*, c. 91, on the 1st of January 1853, but had on the 30th of December 1852 published notices of the poundage rate being payable by instalments, one of which instal-

ments was payable on the 31st of December 1852. A claimant to vote at Parliamentary elections for the borough had paid all his poor-rates on the 1st of July 1853, save those in this notice of the consolidated rate entered in the Collector-General's book; and at the revision of voters his name was objected to because of the non-payment of these rates.

*Held*—That such rate was not one payable within 13 & 14 *Vic.*, c. 69, s. 5, before the 1st of January 1853, and that its non-payment did not disqualify the claimant.

M. T. 1853.  
*Exch. Cham.*  
RYAN'S  
CASE.

two shillings in the pound. The Collector-General caused the said rate to be entered in several books, according to the wards of the city.—[The entry was set out.]—This entry was made in the Collector-General's book, No. 1, on or before the 31st of December 1852. In the first page of the book was contained a declaration, that "the entries of that portion of the houses, buildings, &c., situate "and comprised in Arran-quay ward of the borough of Dublin, and "of the owners and occupiers thereof, respectively included and "referred to in the general rate and assessment, was this day made "by me, whereof the following is a full and true copy, viz."—[The copy was set out.]—And this declaration was made and given by the Collector-General on the 1st of January 1853, and then certified on same day and year by the Collector-General, that its contents were correct.

The case then stated that the Collector-General affixed his seal to and signed this statement at the commencement, and also the statement or certificate in the final page of the book on the 1st of January 1853, at or about twelve o'clock at noon; and that on the 30th of December 1852 he signed a notice, as Collector-General, specifying that from the proper persons, &c., the instalments were to be paid in manner following, viz.:—the first instalment to be payable forthwith; the second instalment on the 1st day of March next; the third on the 1st day of June next; the fourth on the 1st day of September. This notice was published on the 31st of December 1852 in the *Dublin Gazette* and two other newspapers; and another notice of a like purport was published on the 7th of January 1853.

The respondent had paid on the 1st of July all poor-rates payable by him in respect of the premises, except the rate entered in the book and comprised in the notices, which was unpaid. The Revising Barrister was of opinion that, inasmuch as the book was not signed by the Collector-General on the 1st of January 1853, the rates comprised in it and in the notices were not, within the meaning of 13 & 14 Vic., c. 67, s. 5, payable from the respondent in respect of the premises previous to the 1st of January in this year, and overruled an objection to the respondent, and retained his name on the list of voters.

*Brereton* and *Hyndman* appeared for the appellant.

The question in this case is, whether, according to the Dublin Collection of Rates Act, 12 & 13 *Vic.*, c. 91, the rate was payable before 1st of January 1853?—[*MOORE, J.* Whether the signature of the Collector-General be necessary, preparatory to a liability attaching, is the short question. If this rate were payable before the 1st of January 1853, the respondent is disqualified, and must be struck off.]—12 & 13 *Vic.*, c. 91, ss. 32, 48, 49, 52 & 53 were referred to.—[*BALL, J.* Signing must precede the publication of the entry, under that 49th section.—*MOORE, J.* The rate cannot be considered to be legally imposed under that section until the Collector-General has made the entry and signed it.]—We say the rate was payable on the 31st of December.—[*PERRIN, J.* The rate is not payable before the year expires.]

M. T. 1853.  
*Exch. Cham.*  
RYAN'S  
CASE.

*Coffey* appeared for the respondent.

*Per Curiam.*

The decision of the Revising Barrister must be affirmed, with costs.

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12 & 13 *Vic.*, c. 91, s. 32.—Boards of Guardians are every year to estimate the expenditure for a year, from the 1st of January following, and to transmit the same to the Collector-General, who is to collect the same.

Section 48.—The Collector-General, upon receiving such yearly estimates, is to assess them according to the valuation for poor-rate.

Section 49.—All assessments are to be entered in a book, and signed by the Collector-General, and when notice shall have been given as mentioned, such rates are to be deemed good.

Section 52.—The Collector-General is to give notice of the rate in the *Dublin Gazette*, and two Dublin papers, and if the rate is to be payable by instalments, the days upon which it will become payable; and from and after such publication, the rates shall be deemed due and payable.

Section 53.—A demand of the rate is to be made before it shall be considered due, for the purpose of enforcing it by a distress or otherwise, and the particulars of the notice shall contain the valuation of the tenement, the poundage rate thereon, and the amount charged, and the days when payable by instalments.

H. T. 1854.  
*Exch. Cham.*

WILLIAM COLLINS, . . . . *Appellant ;*  
 GEORGE MOFFETT, . . . . *Respondent.*

1853, Dec. 8.  
 1854, Jan. 10.

A claimant's name was placed and returned by the Town-clerk on list No. 7, as entitled to vote for the city of Dublin; an objection was in due time taken to his name being retained on this list, and notice thereof duly served. The claimant served notice on the Town-clerk of his claim to be put on list No. 12, and he was by him returned on that list as a £10 leaseholder. No objection to this claim was taken or served on him or on the Town-clerk. On the revision of list No. 7, it was proved that the claimant held an office which disqualified him from voting, and his name was expunged from that list; but when list No. 12 was revising, this general disqualification was suggested, and it was contended that as no notice of objection to his being on list No. 12 had been served, the Barrister had no jurisdiction to inquire into the case.

THIS was an appeal from the Revision Court of the county of the city of Dublin. In the Barrister's report he stated that at the Court of Revision held in September 1853, William Collins, of No. 20 Portland-row, in the city of Dublin, appeared upon the list No. 7, of persons entitled to vote in the election of members for the said city, and that Mr. H. Phibbs objected to his name being retained on the list. A general notice of objection and service thereof by production of a copy of notice with post-office stamp upon it on Collins was duly proved; and it was further proved that the appellant was employed in collecting or managing the duties of excise, and thereby incapacitated from voting. The Barrister accordingly expunged his name from said list. The name of William Collins again appeared in list No. 12, of persons (not being on the freemen's roll) claiming to have their names inserted in the list of persons entitled to vote at the election of members for the said city, in respect of any right whatever, other than the occupation of premises of the net annual value of £8 or upwards. In this list the nature of his qualification was stated to be "leaseholder—£10 house." No objection to the name of the appellant being retained on list No. 12 was taken or served; but the respondent, on the reading of the list, verbally objected to the name being retained, and the Barrister, knowing from the evidence before referred to, that the appellant was by statute incapacitated from voting in the election of members to serve in Parliament, expunged the name of the appellant. The Barrister added to his statement, that as this was an important

*Held*—That when the Registry is correct on the face of it, the Barrister has no authority to inquire into the case (except in the case of death), unless an objection has been taken, and unless there be an objection attached to the claimant's name on the list as taken, and notice of it served; the attendance of the voter on production of any evidence is not to be required.

*Held also*—Where a name is erroneously expunged from the list of voters, this Court will make an order to have it restored.

question as to the jurisdiction of the Barrister in revising the lists in cases where no objection had been taken by the Town-clerk, under the 34th section of 13 & 14 *Vic.*, c. 69, or by any other person, under the 36th section, to the retention of the names, it was argued before the three Revising Barristers, and they had decided that they had no jurisdiction either to require the claimant to give any evidence in support of his claim, or to receive evidence to negative the right of any claimant to have his name retained on the list; but to enable the parties to appeal, it was decided *pro formâ* against the appellant.

H. T. 1854.  
*Esch: Cham.*  
COLLINS'S  
CASE.

*Brereton* and *Hyndman* appeared for the appellant, but the Court called on—

*Coffey* and *P. O'Brien*, who appeared for the respondent.

The Barrister was bound to expunge the name of the appellant, whether notice was given or not, he having judicial knowledge of his disqualification.—[*PERRIN, J.* Is there any limitation as to the time when a claim may be put in?—The claim must be sent in on the 4th of August, and the 20th of August is the last day for serving a notice of objection; and it would cause great inconvenience to require a notice in every case—there being above 4000 claimants; besides, the Barrister has the power to impose costs on a party making a frivolous objection. But, independent of the judicial knowledge by the Barrister of the claimant's disqualification, the claimant is bound to make out a *primâ facie* case.—[*PERRIN, J.* If the Barrister can act on his judicial knowledge, he could do so whether the party be present or absent; and your argument is, that every claimant must attend, whether objected to or not.]—13 & 14 *Vic.*, c. 69, s. 56, gives the Barrister large powers: he is finally to determine upon the validity of claims and objections, and for that purpose is to have similar powers as are given by the 2 & 3 *W.* 4, c. 88.—[*BALL, J.* The 56th section presses against you.—*PERRIN, J.* This name was objected to on one list, and therefore comes within the statute; but the Barrister was bound to ask the claimant—are you the person just objected to?]

H. T. 1854.

*Exch. Cham.*COLLINS'S  
CASE.*Hyndman* replied.*Cur. ad. vult.*

MOORE, J., delivered judgment.

H. T. 1854.

*Jan. 10.*

In this case, which has been argued before us, I thought there might exist a difference of opinion in the Court, and I was prepared to state my views upon it, in which the other members of the Court now substantially concur—I do not say in the reasons on which it is founded, but upon the result at which I have arrived; and they have requested me to deliver the judgment of the Court.

The facts of the case are these:—William Collins, the appellant in this case, was placed and returned by the Town-clerk on the list No. 7, as a person entitled to vote for the city of Dublin. An objection was in due time taken by Mr. Phibbs to the name of Collins being retained on the list No. 7, and notice of the objection was duly served on Collins. It appears that Collins in due time served notice on the Town-clerk, of his claim to be put on the list No. 12; and accordingly he is returned by the Town-clerk on that list as a person claiming to vote as a £10 leaseholder. To this claim no notice of objection was taken or served on him, or on the Town-clerk. When list No. 7 came on for revision before the Barrister, Mr. Phibbs appeared to support his objection; and it was proved that Mr. Collins held an office which disqualified him by statute from being on the list of voters at all, and accordingly the Barrister expunged his name from list No. 7. There is no appeal lodged against that decision, which must therefore be now taken to be right in point of law and fact. When the list No. 12, containing the name of Collins among the list of claimants, came on for revision, Mr. Phibbs also objected to him, on the same ground as before—that is, his general disqualification; and it was urged on the part of Collins, that, inasmuch as no notice of objection to his being on the list No. 12 had been served on him, the Barrister had no jurisdiction to inquire into the case.

The point, being one of jurisdiction, was a very important one, and it was argued before all the Barristers engaged in the revision, and they were unanimously of opinion that they had not jurisdiction to go into the right of Collins to be on the list No. 12; but as no

appeal could have been lodged by any one against this decision, they considered it to be a proper case for the opinion of the Court of Appeal; and accordingly Mr. Shaw *pro formâ* decided against Collins, by holding that he (the Barrister) had judicial knowledge of his being disqualified, and accordingly struck his name off the list No. 12; and from that decision this appeal is brought: and it appears to me that this is not to be considered so much an appeal by a party considering himself aggrieved, as in the nature of a case stated by the Barristers for the opinion of this Court, for their future guidance as Revising Barristers.

H. T. 1854.  
*Esch. Cham.*  
COLLINS'S  
CASE.

After the best consideration in my power, I have come to the conclusion, that the joint opinion of the Revising Barristers was right, and that the decision made in this particular case *pro formâ* ought to be reversed; and I shall state very concisely the reasons for my opinion.

It is necessary for me to give a short outline of the machinery of the Act. By the 28th section, the Clerk of the Peace is directed to make out, on or before the 1st of June, three different lists alphabetically, of all persons appearing on the registry within the eight preceding years. By the 29th section he is bound, on or before the said 1st of June, to transmit the said three lists to the Town-clerk, and by sections 30, 31 and 32, the Town-clerk is bound to ascertain the names of those persons who shall not have paid their poor-rates on or before the 1st of July, and he is armed with full power and means to perform that duty. By the 33rd section, the Town-clerk is bound to make out, on or before the 20th of July, three alphabetical lists, of the same nature as those required from the Clerk of the Peace, omitting therefrom all those who have not paid their poor-rates in due time, and also the other persons specified in that section: and by the same section power is given to him to place the word "objected" before the names of such persons as he shall consider to be disqualified in any of the ways mentioned in that section; and by that same section he is directed to publish the said lists so made out by him on or before the 22nd of July; and accordingly the public has got, from and after the 22nd of July, the means of ascertaining the names of those in-



H. T. 1854.  
*Exch. Cham.*  
COLLINS'S  
CASE.

serted, and any individuals whose names have been omitted can also ascertain that fact. If the name of any person on the list be considered to be objectionable, it is competent, by the provisions of the 36th section, for any person who is on the list, to serve a notice of objection on the party objected to, and also on the Town-clerk; and he must serve this notice on or before the 20th of August. So that the list being published on or before the 22nd of July, a period of twenty-nine days is allowed to the public to take objections to any one on the published lists.

As it might happen that, either by mistake or design, persons might be omitted from the published list, or being there, a person might wish to be placed on the list by a different qualification from that under which he had been previously registered, he is allowed under the 34th section to give notice of such his claim; but he is bound to serve that notice on the Town-clerk, on or before the 4th day of August; and by that same section the Town-clerk is bound to publish a list of such claimants, on or before the 11th day of August. An objection may also be taken to any one on this list; but notice of the objection must be served on or before the 20th of August. So that a period of nine days is only allowed for the taking of objections to persons named in the claimants' list; this period is very short, but the Legislature probably considered that the list of claimants would be a small one.

By the 37th section the Town-clerk is bound to publish, on or before the 22nd of August, a list of all the persons objected to. By the 38th section, the Town-clerk is bound to transmit all those lists to the Clerk of the Peace, on or before the 25th of August; and by the 44th section, the Clerk of the Peace is bound, as soon as possible after the 25th of August, to transmit those lists to the Revising Barrister; and by the 46th section, the Barrister is to hold a Court of Revision between the 8th of September and 25th of October.

I come now to the consideration of the 55th section, which is the one that prescribes and regulates the duties and powers of the Revising Barristers.

But before I examine this section, I would wish to observe, that the machinery of the Act, in directing lists to be published, notices of objection served, and a list of those objected to published, furnishes to my mind a strong inference that the Legislature intended that the objected cases should alone be inquired into by the Revising Barrister; and that unless there was an objection attached to his name on the list as taken, and notice of it served, the attendance of the voter, or production of any evidence, was not then required. And this inference appears to me to be strengthened by sections 52, 53 and 54, which provide for the case of a person who had duly served notice of claim, but had been omitted by mistake or design from the claimants' list; and giving to such person the privilege of going before the Barrister to prove his claim, and allowing a *vivâ voce* objection to be taken to it. Be this as it may, I think the construction of the 55th section is express on the point.

H. T. 1854.  
*Exch. Cham.*  
 COLLINS'S  
 CASE.

The early part of the section gives a power to the Barrister in certain cases to expunge the name from the list, though there should not have been any notice of objection served; but I need not enumerate those cases, as it has not been contended for that the present case falls within any one of them. With the exception of the case of death, all the cases to which this special power is given to the Barrister are those where the defect appears on the registry itself: for instance, if in the list of voters in the city of Dublin, the qualification stated was the occupation of a house in the city of London, the Barrister would have authority to expunge the name, because the nature of the qualification stated was not such as in law could entitle the party to be on the list of voters.

The 55th section then goes on to define the power of the Barrister, where the list is on the face of it correct, and where an objection has been taken and duly served. It provides that "Whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the Assistant-Barrister be at liberty to change the de-

H. T. 1854.  
*Exch. Cham.*  
COLLINS'S  
CASE.

"scription of the qualification as it appears in the list, except for  
"the purpose of more clearly and accurately defining same; and  
"where the name of any person inserted in any list of voters shall  
"have been objected to by the Clerk of the Peace, Clerk of the  
"Union or Town-clerk, or by any other person, and such other  
"person so objecting shall appear by himself, or by some one in  
"his behalf, in support of such objection, and shall prove that he  
"gave the notice or notices respectively required by this Act to  
"be given by him; every such Assistant-Barrister shall then re-  
"quire it to be proved that the person so objected to was entitled,  
"on the 20th of July then next preceding, to have his name inserted  
"on the list of voters in respect of the qualification described in  
"such list." It appears to me that this part of the section is ex-  
press, and that when the registry is correct on the face of it, the  
Barrister has not in any case, except in the case of death, any  
authority to inquire into the case, unless an objection has been  
taken; and I think it clear, that proof of the service of the notice  
of objection is a condition precedent to his entering into any in-  
quiry on the subject. I think this view is corroborated by the  
last part of that section, "provided also that the appearance of  
"the name of any elector (except, &c.), on the list of registered  
"voters, or the copy of the register in each year, shall be deemed  
"to be *prima facie* evidence of his right to have his name inserted  
"in the register for the year then next ensuing."

I believe this Court has been unanimously of opinion, that if  
a party be on one list by virtue of one qualification, and also on  
the list of claimants by virtue of another and different one, and  
that an objection has been taken to him on one list, but no  
objection to his being on the other, the Barrister cannot inquire  
into the case, where there was no objection.

But it was very ingeniously suggested by one of the members  
of the Court, that though this might be so where the qualification  
in the two lists was different, and that although he might fail  
in showing he had one of them, he might yet have the other,  
and for want of an objection could not be required to prove  
that other, yet that when on the objection there was shown a

general and total disqualification, it might be considered that the objection was applicable to every list on which the name of the party so disqualified might appear. I was at first much struck by this suggestion, and by the apparent absurdity and injustice of a person being retained on any list, who has been shown to be totally disqualified to be a voter. But on further consideration of the Act, I do not see any thing to support that distinction.

H. T. 1854.  
*Exch. Cham.*  
 COLLINS'S  
 CASE.

It has been strongly urged that the construction I have given the Act will let in a great body of fraudulent claimants; for that the period of nine days given by the Act, for objecting to a claimant, is so short as almost to preclude the possibility of serving objections in every case within the limited time; and I think it was stated by Counsel that the list of claimants at last revision exceeded the number of five thousand. I think it very probable that if the law stands as it is, fraud has been practised, and may hereafter be practised, by the service of very numerous claims for which there is no foundation, the parties taking their chance of there being no objection taken. But if such a fraud is found to exist, it is for the Legislature to provide against it, and not for this Court, whose only province is to construe the Act of Parliament as they find it.

For these reasons, my opinion is that the decision of Mr. Shaw, made *pro formâ* and against his own opinion, should be reversed; and we are agreed that he and the other Revising Barristers were right in holding that they had no jurisdiction, under the circumstances of the present case, to interfere with the appellant's name in the particular list, or to inquire into any matter except in the cases pointed out by the statute.

That being so, the next question is, what order is this Court to make? We are now reversing the decision of the Revising Barrister, which was a wrong one (though, as before stated, only come to *pro formâ*); and as the Barrister expunged the name of the appellant, without having jurisdiction so to do, this Court feels bound to make an order restoring the name to the list.

PERRIN, J.

I concur in the decision; but I must say that the statute requires amendment.

H. T. 1854.  
*Exch. Cham.*  
COLLINS'S  
CASE.

BALL, J.

I concur in the judgment of my Brother MOORE, and the reasons given by him. Further, I must say, that if it were the law that the Barrister had this power, the claimant might be deprived of his franchise by not being in attendance to perfect his right. The objection is always general, and the claimant attends in a case in which he is disqualified; and then there comes on another case in which he supposes there may be no objection to his qualification, and he does not attend; and he not being in attendance, evidence is given of disqualification, which he might have shown had no foundation: the consequence would be that he would be unjustly treated, and it would be enabling the Barrister to carry into a subsequent case a knowledge obtained in the first.

JACKSON, J.

I concur. It would be a direct violation of the statute, if the Barrister were at liberty, without notice to the party of any objection, to strike his name off the list; but further, the disqualification which existed might be removed in the interval.

Let the order of the Court of Revision be reversed, and the name of the appellant be restored.

No costs.



M. T. 1853.  
*Exch. Cham.*

MURPHY, *Appellant*; CONNOR, *Respondent*.

SAME *v.* SAME.

SAME *v.* SAME.

Dec. 8, 9,  
 11, 19.

THESE were three consolidated appeals from the decision of the Assistant-Barrister of the county of Kerry, at the October Sessions. In the first case (Chute's case, No. 4), Pierce Chute claimed to have his name inserted in the list of voters for the borough of Tralee. The claim was headed No. 10, and was directed to the Clerk of the Town Commissioners of the borough, requiring him to have it inserted in list No. 3, of persons entitled to vote. The qualification, as stated in the claim, was "as a free burgess of the borough of Tralee, in the county of Kerry, and resident within seven statute miles of the place of election for said borough." The respondent's notice of objection to the claimant was headed "No. 14;" and in it he objected "to the name of Pierce Chute being retained on the list No. 3, of persons entitled to vote."

The case, as stated by the Barrister, set out that it was argued on the part of the respondent, that by the note at foot of the form No. 10 in the schedule B, to 13 & 14 *Vic.*, c. 69, it was required, "If more

Under the provisions of 13 & 14 *Vic.*, c. 69, certain lists of electors for boroughs are to be prepared according to forms numbered 7, 8 and 9 respectively in a schedule to the Act. Claimants omitted from these lists are to give notice to the Town-clerk of the borough, of claims to be inserted in whatever list the claimant may consider himself included, pursuant to the forms in the schedule; and

persons objecting to names being on the list must serve notice of objection according to form No. 14 in the schedule.

Two lists only were prepared by the Town-clerk of T.—one corresponding to list No. 7 in the schedule, the other to list No. 8. No list corresponding with No. 9 was prepared. A claimant sought to be admitted to be inserted in list "No. 3," and was objected to, though it was admitted he would have been entitled to be inserted in a list corresponding with No. 9 in the schedule. The Barrister held the notice of claim and of objection bad, for uncertainty.

*Held* on appeal, that the notice was sufficiently certain, and even if inaccurate, it was cured by the 115th section of 13 & 14 *Vic.*, c. 69.

*Held*, that the headings of forms in the schedules to the Act are no part of the Act.

Where sufficient appears on the case reserved by the Barrister to enable the Court to give judgment as to retaining a name on a list of claimants, this Court will not remit the case for amendment, but decide on the reservation, either by expunging or inserting the name.

M. T. 1853.  
*Exch. Cham.*  
MURPHY'S  
CASE.

"than one list of voters, the notice of claim should specify the list to which the claim refers;" and there being in this case no such list as No. 3 published by the Town-clerk, the notice of claim was insufficient, and the notice of objection good. The Barrister allowed the claimant to go into his case, subject to the objection as to notice of claim, and at the close of the evidence declined to give any decision as to the evidence, inasmuch as he thought the notice of claim insufficient, and ruled that the name of Pierce Chute should not be inserted on the list.

The question he reserved was, "Whether, under the circumstances mentioned and set forth in the above statement, the notice of claim of the said Pierce Chute was insufficient, and whether the objection was valid and sufficient? If the Court be of that opinion, the said list was to stand without amendment; but if the Court should be of a contrary opinion, then the said list was to be amended, by inserting the name of the said Pierce Chute."

The case, on its first being heard before this Court, was remitted for further information to the Barrister, and he then reported that the clerk of the Commissioners had prepared but two lists of voters according to forms 7 and 8 in schedule B, and headed respectively 7 and 8; but he had omitted to prepare a list No. 9; and that the objection on which he decided the notice of claim insufficient was, that it referred to a list No. 3, and the claimant claimed to have his name inserted in said list, which had no existence.

In the second case (Barrett's case, No. 5), the name of James Barrett appeared on the Town-clerk's list No. 7, as a rated occupier, and notices of objection were served upon Barrett and the Town-clerk, objecting to his name being retained on "list No. 1." These notices of objection it was argued were bad, because, pursuant to the note in schedule B, at foot of forms Nos. 14 and 15, they should have specified the list to which the objection referred; and the lists published by the Town-clerk being No. 7 and No. 8, the objection was directed to list No. 1, which was not in existence. On the other side it was argued that, as the 33rd section of 13 & 14 Vic., c. 69, directed the Town-clerk to make out lists—that is to say,

*first*, an alphabetical list according to the form [numbered 7] in the schedule, &c., of occupiers, &c., this was correctly designated as list "No. 1." The Barrister held the notices of objection insufficient, having regard to the 33rd section, and the forms in the schedule (the 118th section making the schedules part of the Act), and that inasmuch as no such list as "list No. 1" existed, the notices of objection were calculated to mislead. The claimant, considering this objection a valid one, declined to go into a case, and the Barrister retained Barrett's name on the list, and the question he reserved was, "Whether, under the circumstances mentioned, the name of the said James Barrett was rightly retained upon the list of voters for the borough of Tralee?"

M. T. 1853.  
*Exch. Cham.*  
MURPHY'S  
CASE.

In the third case (Connor's case, No. 6), the party objected to was on the list of claimants, instead of the Town-clerk's original list "No. 7." The notice of objection was the same as in the previous case, and the Barrister ruled it to be insufficient, adding, "The question for the consideration of the Court is, whether the said notices of objection are sufficient in law? If the Court should be of opinion that the said notices are not sufficient, the name of the said James Connor is to be retained. If the Court should be of a contrary opinion, the said list is to be amended by expunging therefrom the name of the said James Connor."

*Napier, Lane and Hickson*, appeared for the appellant.

The schedules to 13 & 14 Vic., c. 69, provide for three distinct classes of claimants. The 33rd section requires the Town-clerk annually to make out alphabetical lists; first, according to the form No. 7 in the schedule B; secondly, according to the form No. 8 in said schedule, and thirdly, a list of all persons on the freemen's roll. There cannot be more than three lists. The 34th section provides, if any one be omitted from the list, he is to give to the Town-clerk a notice according to the form No. 10 in the schedule, or to the like effect; and by a note to the form, the notice of claim should specify the list to which the claim refers; and the Town-clerk is to include the names of all persons so claiming as aforesaid in lists, according to the forms numbered 11, 12 and 13 in the



M. T. 1853.  
*Each. Cham.*  
 MURPHY'S  
 CASE.

schedule. The headings in the schedule of the lists of voters are 7, 8 and 9. In Chute's case, the notice of claim is called the list No. 3 instead of No. 9; but we contend the headings of the lists are no parts of the form. The numbering refers to the order in which the forms are printed in the schedule. It was the Town-clerk's duty to have made a third list, and had he done so, the claimant's name would there appear. The same objection is applicable to the notice of objection, that is applicable to the notice of claim; so that if the objection be a valid one, the notice of objection is also insufficient, and the claim of Chute must stand as unobjected to. We, however, submit, that the notices of objection described the list with perfect accuracy; and it would have been informal had it pointed to list No. 7, which had no existence. But even assuming there is an inaccuracy, it is cured by the 115th section, which enacts, that "No misnomer or inaccurate description of any person, place or thing, named or described in any schedule to this Act annexed, or in any rate, list or copy of register of voters, or in any notice required by this Act, shall in anywise prevent or abridge the operation of this Act, with respect to such person, place or thing, provided that such person, place or thing shall be so denominated in such schedule, rate, list, copy of register or notice, as to be commonly understood."

Then, as to the notice of objection. The 36th section directs objectors to give notices of objection according to the form No. 14 in schedule B, or to the like effect; and that form has a note at foot, that if there be "more than one list of voters, the notice of objection should specify the list to which the objection refers, and if the list contains two or more persons of the same name, the notice should distinguish the person intended to be objected to; and if the person be registered under 2 & 3 Vic., c. 88, the notice must so state."

*J. D. Fitzgerald, Sir C. O'Loughlen and Neligan, contra.*

The notice of objection must follow the notice of claim; and we say that was insufficient.

*Lane* objected that the respondent must prove his notice of

objection good, before he could be heard as to the validity of the notice of claim.

M. T. 1853.  
*Exch. Cham.*  
 MURPHY'S  
 CASE.

*J. D. Fitzgerald.*

The 54th section authorises any one, whose name is on the list of voters, to oppose the claim, on merely giving notice in writing of his intention to oppose.—[MOORE, J. This objection is not *ad idem* with the claim; how can a name be retained on the list that is not there at all?—The list of burgesses is described as No. 3, and according to *Barton v. Ashley (a)*, this was not sufficient.—[PERRIN, J. The numbering is no part of the forms, and is only for reference to the sections.—BALL, J. The numbers are only descriptive of the forms as they appear in the schedule; that is plain from the 29th section of the Act.]—But each printed form must have a number on it; and the precept which the Clerk of the Peace addresses to the Town-clerk, as in form No. 4, schedule B, directs him to publish copies of the said lists, Nos. 7, 8 and 9; and by the 118th section the schedules are made part of the Act. The notice of claim ought to have been applied to list No. 9, and the notice of objection ought to have been pointed at list No. 7. On the form of objection it is plain there should be a specified number: "I hereby give you "notice, that I object to your name being retained on the list "(No.—) of persons entitled to vote in the election of members "for the borough of Tralee."—[MOORE, J. Suppose the Town-clerk had put No. 500 on the list?—It must be assumed that the officer will do his duty. We say, if by possibility lists 1, 2 and 3 could be published, this notice of objection is bad: *Farrer v. Edworth (b)*; *Wollett v. Davis (c)*. The notice of objection was to embarrass the claimant, by taking list No. 3, to which the claim is directed, to be the same as list No. 9; that could not be the proper list for a free burgess qualification to appear, as it is distinct from that of a freeman: *Tottenham's case (d)*.

(a) 2 Com. B. 4.

(b) 16 Law Jour., N. S., C. B. 132.

(c) *Ibid*, 185.

(d) 2 Ir. Com. Law Rep. 572.

M. T. 1853. *Hickson* replied.

*Esch. Cham.*

*Cur. ad. vult.*

MURPHY'S  
CASE.

PERRIN, J., delivered judgment.

*Dec. 9.*

In two of these cases an objection was made to the notice of objection below; and it was contended that the claimant was not bound to establish his qualification, because there was not a notice of objection pursuant to the statute 13 & 14 *Vic.*, c. 69. The notice of objection referred to list No. 1, and it was said the reference should have been to list No. 7; and it was argued that the notice, according to the form in the statute, must contain the number in the schedule to the Act of Parliament prefixed to the document, which is referred to by the Act, and that in fact the number formed part of the document itself. The 33rd section of the Act directs the Town-clerk to make out an alphabetical list, according to the form numbered 7 in the schedule B, and another list, according to the form numbered 8, and a third list, according to the form numbered 9 in the schedule; and the argument is, that the numbers prefixed to these forms constitute part of the form itself. It would be singular if such were the meaning of the statute. We are satisfied that the number is not part of the form at all; the weakness of the proposition is illustrated by the fact that there were but two lists in point of fact prepared by the Town-clerk, and those had on them the figures 7 and 8; and it is said these are the proper numbers of the list. The party objecting says he objects to the name being retained on the list No. 1, and this he does in compliance with the note at foot of the schedule; that is, being required to specify a list, he objects to the name being on list No. 1. There may be a want of precision growing out of the facts of this case, and arising from the mistake of the Town-clerk in affixing numbers that he thought were put in the schedule; but we think the party fairly understood the list No. 1 as the first of the lists prepared by the officer; and we further consider that if there be any inaccuracy in it, it is not an inaccuracy calculated to mislead. We are of opinion therefore the objection taken below was not well founded, and ought not to have been allowed.

BALL, J.

I entirely concur. As to that case of *Barton v. Ashley*, I have looked into it, and our decision here does not at all interfere with the principle of the judgment. There the notice did not specify in any form whatever the list to which reference was made—it was perfectly general, and in fact there were two lists of voters, on either of which the name objected to might have been, and the Court properly held the notice of objection insufficient; but here we are dealing with facts quite distinct, dealing with an objection not such as there made, but with a notice referring to the list to which the objection is applied. It is alleged the specification of the list is inaccurate; but I am not prepared to agree in that, for treating the numbers as surplusage, they cannot be regarded as substantial matters characterising the list. The numbers do not affect the substance of the list, nor do they constitute any part of it. But even assuming the specification inaccurate, the 115th section of the statute disposes of the matter. The corresponding section in the English Act could not have applied to *Barton v. Ashley*; because the notice there omitted any specification of a list; that was not a mere inaccuracy, but a case where there was no specification of a list at all.

M. T. 1853.  
*Exch. Cham.*  
MURPHY'S  
CASE.

JACKSON, J.

As I entirely concur, I would only say that *Barton v. Ashley* does not interfere with the present case; and I think it might be contended that the notice describing the list as "No. 1" had been by the Legislature designated such. The numbers prefixed to the forms are no part of the forms.

MOORE, J.

A notice of objection must refer to some list, and if it do not, on the face of it, it is bad. That is the effect of the judgment in *Barton v. Ashley*. But here there was a distinct reference to a list perfectly regular on the face of it, and it is sought to be made bad, because, in point of fact, it refers to a wrong number. I am inclined to the opinion, that "list No. 1"

M. T. 1853.  
*Exch. Cham.*  
MURPHY'S  
CASE.

was the proper list referred to; for it would be absurd to say it referred to list No. 7, when there were but two lists altogether. I think, therefore, there was a substantial compliance with the Act; and even if this were an inaccuracy, it is cured by the 115th section of the statute. I concur in the judgment of the Court.

PERRIN, J.

*Barton v. Ashley* is rather an authority against the view for which it was here cited; for it was never suggested there that the numbers were any part of the lists.

*Napier* then applied, under the 80th section, for an order that the register be corrected in pursuance of the decision of the Court, by the Clerk of Errors, and the Court directed the cases to stand.

PERRIN, J.

Dec. 11.

In Chute's case, the precise facts are not plainly apparent, but as we understand it, there was an objection to the notice of claim; and it was contended the notice was defective, that in fact there was no notice of claim. The Assistant-Barrister was of opinion that the notice of objection was sufficient, and decided that Chute's name should not be retained on the list; but it also appears that he stated he would hear any evidence that might be offered in support of the claim. This Court are of opinion that the claim was proper and unobjectionable in form; but the claimant having gone into evidence, on which the Barrister gave no opinion, and made no decision (unless by stating the name should not be retained on the list), the validity of the claim, and the effect of the evidence, are without any decision of the Barrister. The 55th section of the statute directs the Assistant-Barrister, on a notice of objection being given and proved, to require the claimant to prove he was entitled to be placed on the registry; but in this case, the Barrister, being of opinion that the form of objection was bad, did not require the claimant to go into evidence; and a difficulty has thence arisen as to what

is to be done with this name. This difficulty is especially felt when we revert to the 58th section, requiring the Revising Barrister to give his opinion generally on the facts appearing in evidence, and especially his decision on the point of law; and at present we are of opinion we have not jurisdiction to say if Chute should be on the register, though we agree in thinking his claim was formal and correct.

M. T. 1853.  
*Exch. Cham.*  
 MURPHY'S  
 CASE.

The cases having been again ordered to stand over, were now called, and—

Dec. 19.

*Napier, Lane* and *Hickson* argued as to Chute's case; that as the Court had decided his notice of claim was good, the register should be altered, by admitting the claimant, in pursuance of the reservation of the Barrister; and they cited *Edward Beglin's case*, in the *Addenda to Lumley's Registry Law*, and *Bayley v. The Overseers of Nantwich (a)*. The Court, under the 78th section, if they consider the statement of the appeal sufficient to enable them to give judgment in law, are bound to do so; and having by their judgment reversed the decision of the Barrister, they are bound by the 80th section to order the register to be altered.

Sir *C. O'Loghlen*, contra, contended that if the Barrister failed in the discharge of his duty, and abstained from giving any opinion, the claimant must suffer.

*Per Curiam.*

We must reverse the decision of the Assistant-Barrister, and place Chute's name on the list.

As to *Barrett's* and *Connor's case*—

*Napier* and *Lane* contended that the Barrister, having decided that the notice of objection was bad, had precluded them from inquiring into the claims, his reservation being conclusive, and that

M. T. 1853. the names should be struck off the lists: *Wansey v. Perkins* (a);  
*Exch. Cham.* *Bishop v. Helps* (b); *Hitchins v. Brown* (c).  
MURPHY'S  
CASE.

JACKSON, J.

The claimant having rested his right upon the validity or invalidity of the notice of objection, he must take the consequence.

MOORE, J.

The functions of the Court would become useless, if we merely expressed an opinion, and did not correct the register.

Sir C. O'Loughlen, contra.

Barrett's case rules the rights of fifty-nine claimants in this borough. There is no reservation in terms in the Barrister's statement, and the cases cited turned on the express words of the reservation.

*Per Curiam.*

Reverse the decision of the Assistant-Barrister in Chute's case, Barrett's and Connor's, and let the registry of voters be amended, by inserting the names included in No. 4, and expunging those in Nos. 5 and 6.

(a) 8 Scott, N. R., 958.

(b) 2 C. B. 45.

(c) 1 Lut. 328.

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T. T. 1853.  
*Exchequer.*

Lessee HEALY v. DONNERY.

(*Exchequer.*)

June 1.

**EJECTMENT** for non-payment of rent, tried before Crampton, J., on the 3rd of May 1853. On the trial, the lessors of the plaintiff proved a lease of the premises for 100 years, made to the defendant by Margaret Healy, deceased, their mother, at a rent of £35 per annum. This lease was made on the 2nd of January 1850, and contained the usual covenants, with a proviso that if the lessee should expend £70 on the premises, the lessor should not demand the first two years' rent, which the lessee covenanted to do. No rent had been paid under the lease, and this ejectment was brought by all the children of Margaret Healy, as lessors of the plaintiff. The defendant gave in evidence the will of Matthew Shannon, father of Margaret Healy, under which she took the premises in question, whereby the testator, after reciting that he was seised of a freehold estate in the demised premises, devised as follows:—"I leave, devise and bequeath unto my said daughter Margaret Healy all my freehold interest in North King-street, in the city of Dublin, upon trust to receive the rents, &c., thereof, for and during the term of her natural life, for her own sole use, &c., notwithstanding her coverture, without the control of her present or any future husband, &c., with power to my said daughter, by any deed or will, to dispose of, devise or bequeath the said freehold estate to and among her children, in such shares and proportions as she shall think fit and proper." There was also a residuary clause, in these words:—

in such shares and proportions as she shall think fit and proper." After some bequests, a residuary clause followed, in these words:—"I do hereby give, leave and bequeath to my said daughter Margaret Healy all the rest, residue and remainder of my worldly substance, of what nature or kind soever, for her own sole use and benefit, without the control," &c., &c.—*Held*, that M. Healy took the absolute interest in the freehold estate; that the power was a naked one, not coupled with a trust, and that no estate was given to the children by implication from the words of the power.



T. T. 1853. "I do hereby give, leave and bequeath to my said daughter M.  
*Eschequer.*  
 HEALY  
 v.  
 DONNERY. "and benefit, without the control," &c., &c. There was no execution of this power by M. Healy; and Counsel for the defendant called on the learned Judge to direct a verdict for the defendant, on the ground that M. Healy under this devise took an estate for life only, and her children the fee, by implication, as tenants in common; that the lease therefore expired on the death of M. Healy, and that even though the lessors of the plaintiff elected to confirm it, still the condition of re-entry, being apportioned, was gone, and that therefore this ejectment could not be maintained.

For the plaintiff, it was insisted that there was no gift by implication to the children of M. Healy; that the power was a naked one; that M. Healy herself took the fee under the will, or at least the whole legal estate; and that one of the lessors of the plaintiff being her heir-at-law, the ejectment was maintainable.

The learned Judge directed a verdict for the defendant, giving the plaintiff leave to move to have the verdict changed into one for himself. A conditional order having accordingly been obtained—

*Semple* (with whom was *M. Mahon*) showed cause.

The only question is the estate taken by M. Healy. She takes only for life, her children taking the remainder in fee as tenants in common, by implication from the words of the power: *Hockley v. Maubey* (a). The lease is therefore expired, or if set up by the remainderman, the condition of re-entry is lost.

*Thomas O'Hagan* (with whom was *John O'Hagan*), contra.

Margaret Healy, under the early part of the will, takes a life estate, coupled with a naked power, from which, if she does not exercise it, no estate can be implied to the children: *Crossling v. Crossling* (b). But under the residuary devise, she takes the

(a) 1 Ves. jun. 143.

(b) 2 Cox, 396.

fee: *Hogan v. Jackson* (a).—[GREENE, B. The testator begins by reciting that he is about to dispose of his freehold interest.]—Even if the power were one coupled with a trust, the title of the heir-at-law must prevail in a Court of Law. As to powers, whether coupled with trusts: *Harding v. Glyn* (b); *Duke of Marlborough v. Godolphin* (c); *Brown v. Higgs* (d).

T. T. 1853.  
*Exchequer.*  
 HEALY  
 v.  
 DONNERY.

*John O'Hagan* was not called on.

*M'Mahon*, in reply.

There are no words in the will capable of giving more than a life estate to M. Healy; but she has a power, coupled with a trust for her children; and where there is a power of distribution among a class, and no gift over in default of appointment, they take in default of such appointment: 1 *Jarman on Wills*, p. 485; *Lees v. Mosley* (e).—[GREENE, B. In that case, there was a direct devise to the issue.]—*Mason v. Lymberry* (f). Sir Edward Sugden disapproves of *The Duke of Marlborough v. Godolphin*, (2 *Sug. Pow.* 163); *Holloway v. Holloway* (g); *Brown v. Pocock* (h); *Casterton v. Sutherland* (i). The ground of these decisions was that a gift was implied from the power of distribution: The residuary clause, by the language of it, is restricted to the personal estate. The only question in the case is whether the children take the legal or only an equitable estate; and the Court holds in such cases that the legal estate passes, where it is required to carry out the intention of the testator: *Hill on Trustees*, p. 220; *Nash v. Coates* (k). Here, on the death of the mother, it was plainly the intention of the testator that the children should have both legal and equitable estate.

PENNEFATHER, B.

This is an ejectment for non-payment of rent, by the children

(a) Cowper, 299.

(c) 5 Ves. jun. 506.

(e) 1 Y. & C., Ex., 589.

(g) 5 Ves. jun. 399.

(i) 9 Ves. 445.

(b) 8 Ves. jun. 571.

(d) 4 Ves. jun. 708.

(f) 2 Sug. Pow. 165.

(h) 6 Sim. 257.

(k) 3 B. & Ad. 837.

T. T. 1853.  
*Eschequer.*  
HEALY  
v.  
DONNERY.

of Margaret Healy, against the lessee, in an instrument dated in 1850, by which she demised to the defendant for 100 years. The lease contains the usual covenants and conditions for re-entry, &c. No rent has been paid under the lease, and Margaret Healy's death furnishes the defendant with an argument which, he thinks, will protect him in his non-payment. He insists that her father's will gives M. Healy only an estate for life, with a power equivalent to a trust, to be exercised for the benefit of her children; and though this power was not exercised, that under it all the children take the fee as tenants in common. All the children are before the Court, along with the heir-at-law, but that is not enough; and this notable point is made, that the condition of re-entry is split, and that the ejectment cannot be maintained by any one or all of the children. The devise is a devise of the entire "freehold interest" of the testator to M. Healy. She was a married woman, and he gives it to her free from the control of her husband, and gives her a power to dispose of "the said freehold estate" among her children, by deed or will, in such shares as she shall think proper. If there was a devise over to a stranger, in default of appointment, there would be no question in the matter. But the will does not contain a devise over to a stranger; but the testator gives, leaves and bequeaths all the rest, residue and remainder of his worldly substance, of what nature or kind soever, to his said daughter M. Healy, "for her own sole use and benefit." It is argued that the power to appoint among the children is tantamount to a trust created for them. I have always considered that there was a distinction between a mere power and one coupled with a trust; and though I called on Counsel for an authority to the contrary, no such case has been cited. But particular cases have been cited, in which Courts have thought that they collected from the peculiar words of the power an intention of the testator to give to children in default of appointment. The general position contended for by the defendant's Counsel has never been laid down; and I cannot say that this case falls within the authority of any of the cases cited. What would be the meaning of all those efforts

to find whether trusts can be spelled from the particular language of powers, if the general principle contended for existed? I can see a distinction between the present case and all those cited, and have the gratification to think that this *honest* defence is not sustainable in law, but that the heir-at-law can maintain this ejectment.

T. T. 1853.  
*Eschequer.*  
HEALY  
v.  
DONNERY.

GREENE, B. \*

I do not think that the words of this will come within the reasoning or authority of any of the cases cited for the defendant. The absolute interest is given to the wife in the first instance, and there is also a residuary gift to her; unless, therefore, the language of the power cut down this interest to a life estate, she takes the whole. None of the cases cited for the defendant establish this proposition. In my opinion, she has an absolute interest, coupled with a power which she may exercise or not, and her being a married woman accounts for this mode of limitation to her.

Order absolute.

\* PIOT, C. B., and RICHARDS, B., *absent*.

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T. T. 1853.  
*Queen's Bench*

SWIFT v. SWIFT.

(*Queen's Bench.*)

June 4.

After the plaintiff's case has been stated to the jury, and a fatality arises owing to the absence of a witness, the Judge has no jurisdiction to allow the plaintiff to withdraw the record; the plaintiff must submit to be nonsuited.—(CRAMPTON, J., *dubitante.*)

FITZGIBBON, on a former day, had in this case obtained a rule *nisi*, to enter a nonsuit, pursuant to leave reserved at the trial before the LORD CHIEF JUSTICE, at the last Hilary Sittings. The action was for the recovery of a bill of costs, and it became necessary to examine a gentleman officially engaged in Master Brooke's office. He had not been served with a subpoena, and at the trial was unavoidably absent. Thereupon, after the jury were sworn, and the plaintiff's case stated, Counsel for the plaintiff applied to withdraw the record, owing to this fatality; and the other side, having contended it was too late so to do, insisted on a nonsuit, or that a verdict be entered for the defendant.

The CHIEF JUSTICE allowed the record to be withdrawn, reserving liberty to the defendant to move the Court. Against the rule *nisi*, cause was now shown by—

*Lynch and J. E. Walsh.*

It was in the discretion of the Judge to permit this course to be followed, and no objection can be taken to it when it results from sheer fatality.—[CRAMPTON, J. If the practice were adopted there would be an end of nonsuiting.]—Admitting then that the plaintiff has no right to withdraw the record, there is no stringent rule that, once a jury is sworn, they cannot be discharged until they come to a finding on some of the issues: *Bonsor v. Element* (a).—[CRAMPTON, J. In that case the defendant did not appear, and the course taken was but an adjournment of the case.—PERRIN, J. Is it sworn the witness was subpoenaed?]

(a) 6 C. & P. 230.

It is not; but if a plaintiff, after a jury is sworn, may elect to be nonsuited, why may he not withdraw his record?—[MOORE, J. A defendant by appearing intimates he has rights to maintain.] —At all events, the permission given was in the discretion of the Judge, and that the Court cannot control.

T. T. 1853.  
*Queen's Bench.*  
 SWIFT  
 v.  
 SWIFT.

*Fitzgibbon and Joshua Clarke, contra.*

*Bonsor v. Element* decides nothing; because, as the defendant did not appear, no objection could be made. The consequences of a proceeding such as this would be alarming; for if a plaintiff found on a jury some person unfriendly to him, he could at once withdraw his record.—[CRAMPTON, J. Something is to be said as to the expense.—PERRIN, J. The practice in this country has been with you; and I cannot see how that can be altered, except by a rule of the Court.]—In an *Anonymous case* (a), the jury were sworn before an application was made for postponing the trial; and Bushe, C. J., addressing the defendant's Counsel, asked, "can they do so (withdraw the record) after the jury is sworn?" There is a great difference between jurisdiction and discretion; the latter has been designated "the law of tyrants." The rule of law is in the defendant's favor, and once a case goes to the jury, the Judge has no discretion. In *Ferg. Prac.*, p. 302, it is laid down, "Before that the jury is sworn, it is in the power of the plaintiff, if he pleases, to withdraw the record, but not afterwards; and any application to postpone the trial, at that stage of the proceedings, must be by consent. Before the jury are sworn, such an application must be made *ex parte*, and is addressed to the discretion of the Judge." Such law is laid down in 1 *Arch. Chit. Prac.*, p. 363; *Hopper v. Smith* (b). If this proceeding be sanctioned, how is the *Nisi Prius* record to be made up? In *Edge v. Wandesforde* (c), it was ruled that the Judge cannot discharge the jury from a finding on all the issues, if they be material. The only way that can be done is to enter a nonsuit; for if it could be done after one witness was examined, it

(a) 3 Law Rec., O. S., 73.

(b) 1 M. & M. 115.

(c) 9 Ir. Law Rep. 161.

T. T. 1853.  
*Queen's Bench*

SWIFT  
 v.  
 SWIFT.

might be done after twenty were examined.—[MOORE, J. There was a fatality in the case; and conceding as I do that the Judge had no jurisdiction, yet it would appear to me a matter of course, on payment of costs by the plaintiff, to set aside the nonsuit.]—We were entitled to have a nonsuit entered for us at the trial: *Lee v. Butler (a)*.—[CRAMPTON, J. In the case of *Marquis of Donegal v. Lord Templemore*, tried before me at Downpatrick, I nonsuited the plaintiff, because in a recovery given in evidence by him, it was said the premises, the subject of the action, were not included. The Fines and Recoveries Act was not referred to at the trial, a provision in which allows the record of the recovery to be amended; and the Court set aside the nonsuit, grounded on both Counsel and Judge overlooking the provisions of that statute.]

*J. E. Walsh* replied.

The only question now before the Court is, had the Judge jurisdiction to make the order without the consent of the defendant? *Bonsor v. Element* is decisive that he had; for the principle of consent could not there be regarded, as the defendant did not appear.—[MOORE, J. If the CHIEF JUSTICE made no order as to costs, it is plain the defendant must have been prejudiced.]—The rule of the Court could give him the costs.—[MOORE, J. Yes; but it is a test as to the question of jurisdiction.]—The plaintiff might have withdrawn the record before the jury are sworn, irrespective of costs; though we admit, under the circumstances here, we would be bound, before going to another trial, to pay the costs. The case cited from the *Law Recorder* is a blind one, and of no authority. Sir E. Sugden refused, when here, to have a case cited from it.

CRAMPTON, J.\*

This is a motion of an important character; the question raised being, had the LORD CHIEF JUSTICE jurisdiction enabling him to allow the plaintiff to withdraw his record *inuito* defendant, after

(a) *Arm. Mac. & Ogle*, 93.

\* The CHIEF JUSTICE was absent.

the jury had been sworn, and the plaintiff had stated his case? T. T. 1853.  
*Queen's Bench.*  
 My own impression is rather in favor of the discretion of the  
 Judge; and I am fortified in that by the opinion of the LORD  
 CHIEF JUSTICE. The case cited from the old series of the *Law*  
*Recorder* is not to be relied on; for the report mixes up the  
 withdrawing of a record and the postponing a trial; it is there-  
 fore quite a blind case. My Brethren PERRIN and MOORE are,  
 however, of opinion that the CHIEF JUSTICE had not jurisdiction  
 to make the order; that that jurisdiction does not exist in a  
 Judge sitting at Nisi Prius; and unquestionably, so far as the  
 Irish practice is concerned, it is conformable to that opinion of  
 my Brethren. I therefore relinquish my doubt on the question  
 of jurisdiction, and for conformity sake yield to that judgment,  
 and hold the CHIEF JUSTICE had not jurisdiction.

SWIFT  
 v.  
 SWIFT.

Assuming, then, that the defendant has a right to stand here  
 as he did at the time of the trial, and insist on a nonsuit, has  
 the Court, adhering to its rules, which are the property of the  
 public, authority to say, "you are entitled to a nonsuit; but a  
 "fatality having occurred, not through your default or the default  
 "of the plaintiff, but solely owing to the non-attendance of a wit-  
 "ness, the case has not been tried, and you must be indemnified  
 "in costs?" Now I conceive, under all the circumstances, and in  
 mercy to both parties to put an end to litigation, it would be  
 right to let the defendant carry his motion partially, so far that  
 we will put the plaintiff under terms of proceeding to trial, paying  
 the costs of the former trial and of this motion; but we will not let  
 a nonsuit be entered.

PERRIN, J.

As long as I recollect it, the practice has been as stated by  
 defendant's Counsel; I therefore think that the CHIEF JUSTICE  
 had not jurisdiction to enable the plaintiff to withdraw the record  
 after the jury were sworn and the case stated. Until a rule be  
 passed altering that practice, I hold myself bound to abide by  
 it.



T. T. 1853.

MOORE, J.

*Queen's Bench*

SWIFT

v.

SWIFT.

I entirely agree, as to the jurisdiction of the Judge, with my Brother PERRIN, and after some experience at Nisi Prius, I never knew one instance where that jurisdiction was exercised. That is a reason for saying the power does not exist. Ought the Court then allow a nonsuit to be entered? The CHIEF JUSTICE had all the facts of the case before him, and he considered the matter as a fatality; and that is sufficient for the Court to say, this litigation must cease, the plaintiff paying the costs of the trial and of the motion.

Order.—No rule upon defendant's application, the plaintiff hereby undertaking to proceed to trial in the next Michaelmas Term, the plaintiff to pay the defendant the costs of this motion.

H. T. 1854.

HEWITT v. HEWITT.

*Jan. 28.*

Where a plaintiff seeks to change his own venue on special grounds, the defendant is entitled to the costs of the motion.

J. D. FITZGERALD, on behalf of the plaintiff, moved to change the venue in this cause from the county of the city of Dublin to the county of Cork.

*Exham, contra.*

*Per Curiam.*

The affidavits used on behalf of the plaintiff show sufficient grounds for changing the venue; but as the plaintiff sought to change the venue selected by himself originally, he must pay the costs of the motion.

Rule accordingly.

E. T. 1854.  
*Queen's Bench*

## JOHN TAYLOR v. WILLIAM LOW.

*April 29.*

HEMPHILL, on behalf of the defendant, applied that the plaintiff be restrained from taking any further proceedings in this cause until he shall have given security for costs, inasmuch as he resides out of the jurisdiction of the Court, and has no property therein.

The affidavit of the defendant, in addition to the statement of plaintiff being resident out of the jurisdiction, further alleged—“that he (the defendant) has a just and legal defence upon the merits in this action.” The writ of summons and plaint was delivered to the defendant on the 29th day of March, and on the 8th day of April a preliminary notice was served on plaintiff’s attorney to measure security for costs, before the Master on the 12th. This notice was disregarded by the plaintiff, and on the 12th of April notice of this motion was served. Pending that notice, the defendant, on the 13th day of April, filed an appearance and defence, and with the defence served another notice that the defence was without prejudice to the application for security for costs, and that it was not intended by the defendant that his right to such security should be thereby waived. The writ of summons and plaint was filed by plaintiff, as indorsee, to recover £142. 3s. 6d. on foot of the acceptance of the defendant; and the defence filed was—“That he did not accept the said supposed bill of exchange in the summons and plaint mentioned, as therein alleged, and “therefore he defends the action.”

Under the 52nd section of the Common Law Procedure Act, we are entitled to this order, for we have made a full and satisfactory affidavit, entirely denying our liability on the bill of exchange in question. The 52nd General Rule directs that where a defendant served with summons and plaint shall require security for costs, he shall apply by notice to the plaintiff for such security, “and in “case the plaintiff shall not within twenty-four hours after service

A plaintiff, resident out of the jurisdiction, filed his summons and plaint, and the defendant thereupon served a preliminary notice, calling on the plaintiff to give security for costs, which notice not being complied with, notice of a motion to the Court for that purpose was served upon the plaintiff, grounded upon an affidavit that the defendant had a just and legal defence upon the merits; and pending this notice, defendant filed his defence, notifying to the plaintiff that he did not thereby intend to waive his right to security for costs.

*Held*, that the filing of this defence was no waiver of the defendant’s right to security for costs, and that the affidavit of the defendant was sufficient for that purpose.

E. T. 1854.  
*Queen's Bench*  
TAYLOR  
v.  
LOW.

"thereof, undertake by notice to comply therewith, the defendant shall be at liberty to apply to the Court or a Judge for such security, by motion on notice, grounded upon affidavit; and every such application shall be made before defence filed, unless the Court shall, under special circumstances, think fit to make such order after defence filed." The objection to this motion will be rested on our having put in a defence, but we were obliged to do so; for, by the 54th General Rule, if we had not done so, the plaintiff could have marked judgment, inasmuch as that Rule says—"The service of any notice relative to the giving security for costs shall not operate as a stay of proceedings."

*Faloon, contra.*

This application is too late; it should have been made immediately after the service of the summons and plaint, and before defence. The 52nd section of the Procedure Act was passed to get rid of the inconvenience of parties out of the jurisdiction, suing for small amounts in this country, being obliged to give security for costs; and hence that section requires that defendant shall make a satisfactory affidavit that he has a defence upon the merits. The affidavit here simply states "he has a just and legal defence upon the merits"—no particularising of what that defence is; and general allegations of this sort are not to be encouraged.

Further, the defendant, having pleaded, has waived any right he may have had to demand security, because under the 52nd Rule, after defence filed, such an application is not to be entertained, unless special circumstances be stated. None such appear here, and the motion is therefore untenable.

LEFROY, C. J.

We think the defendant did all he was required to do: he served the preliminary notice, and then he filed an affidavit of merits. We consider the affidavit sufficiently satisfactory. The motion must be granted; but we will allow the costs to be costs in the cause.

PERRIN, J., concurred.

MOORE, J.\*

If the defendant had not put in a defence, the plaintiff would most likely have marked judgment; and I do not think, by his having so done, he waived his right to apply to the Court.

E. T. 1854.

*Queen's Bench*

TAYLOR

v.

LOW.

\* CRAMPTON, J., *absente*.

### HUSTON v. WALLACE.

*April 25.*

CARLETON moved for liberty to file a rejoinder, under the 48th section of the Procedure Act. A writ of revivor had been issued on foot of a judgment, to which the defendant had pleaded the Statute of Limitations; and the plaintiff replied an acknowledgment, in writing, within twenty years. It was sought to rejoin that this acknowledgment was obtained by fraud. No notice of the application had been served; the section does not require either an affidavit or a notice on the opposite party.

The Court, in granting liberty to rejoin, will not confine the rejoinder to any particular matter, but will make the order that defendant be at liberty to rejoin generally.

*Per Curiam.\**

We do not wish to encourage the pleading such matter as you propose, but we will give liberty to rejoin generally.

\* PERRIN, J., and MOORE, J.

E. T. 1854.  
*Queen's Bench*

### FISHBOURNE v. FREEMAN.

*April 25.*

A conditional order will be granted to revive a judgment when the time for payment has not arrived, the time being dependent on a life still in being.

FINCH WHITE moved for liberty to issue a writ of revivor in this cause. The judgment was obtained in 1832, on the joint and several bond of Francis Freeman, sen., and Francis Freeman, jun.; and the condition of the bond was, that the amount was not to be payable until after the decease of Francis Freeman, sen., who is still living.

*Per Curiam.*

Take a conditional order.

[The order was subsequently made absolute, no cause being shown.]

### MURPHY v. TOOHEY.

*April 29.*

Where a summons had been served to settle issues before a Judge on circuit, and the defendant did not attend on the settlement of the same, and the plaintiff proceeded to trial (the defendant not appearing) and obtained a verdict:—*Held*, on motion by way of appeal to set aside the issues and the proceedings founded thereon, on the ground of irregularity, that the summons was regular, and the trial properly had.

THIS was an appeal from issues settled by CRAMPTON, J., at the last Tralee Assizes.

The plaintiff stated that the defendants held a dwelling-house and back-yard, with the store-house and lofts over the same, and the yard thereto belonging, situate, &c., in the county of Cork, as

To a plaintiff, stating that the defendants held certain premises under a lease, as tenants to the plaintiff, at a yearly rent, to which the defendants pleaded that they did not or do not hold the premises as in plaint mentioned, as tenants to the plaintiff, under a lease *modo et forma*; the issues tendered by the plaintiff were—first, whether the plaintiff was entitled to the possession of the premises on the day stated; secondly, what was the amount of rent due by the plaintiff?—*Held*, that these were proper issues.—*Held*, per CRAMPTON, J., such defence was bad, and would have been set aside on motion.

tenants to the plaintiff, under a lease, at the yearly rent of £126, &c. The plaint being served, two of the defendants filed a defence, stating that they did not hold, or do not hold, the dwelling-house and back-yard, &c., in the summons and plaint mentioned, or any part thereof, as tenants thereof to the plaintiff, under a lease, in manner and form as the plaintiff has in his summons and plaint in that behalf alleged.

E. T. 1854.  
*Queen's Bench*  
MURPHY  
v.  
TOOHEY.

On these pleadings, the plaintiff tendered the following issues:— First, whether the plaintiff was entitled to the possession of the said dwelling-house and premises in the plaint mentioned, or any part of them, on the day stated; secondly, what was the amount of rent due to the plaintiff out of or in respect of the said dwelling-house and premises, at the time of the commencement of this action? A summons was issued to settle those issues, before Richards, B., in chamber (who sat to hear general motions for all the Courts, the other Judges being absent on circuit), and he declined to entertain the motion; and a summons was then issued, and duly served on the defendants, to have the issues settled before CRAMPTON, J., at Tralee; the defendants did not appear at Tralee, by themselves or Counsel, and the issues were settled in their absence, in the form above stated, and the case was afterwards tried at the ensuing Cork Assizes; and the defendants again not appearing, a verdict was had for the plaintiff.

*Heron* now moved, by way of appeal against the issues as so settled, that same might be set aside or amended, and that the verdict had for the plaintiff might be set aside, and all subsequent proceedings founded thereon; and that judgment thereon might be arrested, or for such other order, &c., upon the ground that the settlement of the issues at Tralee was irregular, and upon the further ground, that the said issues served upon the defendants, and so settled at Tralee, were not raised by the pleadings, and that no issue raised by the pleadings was settled.

The settling of the issues at Tralee was irregular; they ought to have been settled in Dublin, as there was sufficient time for doing so.

E. T. 1854.  
*Queen's Bench*

LEFROY, C. J.

MURPHY  
v.

TOOHEY.

The Judges have settled issues on circuit, otherwise it would be impracticable to carry out this Act of Parliament; we therefore will not entertain an objection for irregularity on this ground.

*Heron.*—Then the issue settled is an improper one. The 198th section of the Procedure Act enacts, that “every defence to an “ejectment for non-payment of rent shall set forth the substantial “ground of defence; as for example, whether the title of the “plaintiff as landlord is disputed, or the fact of the rent being due, “if in dispute.” We here, under this plea, dispute the landlord’s title; and the issue to be tried should have been in the terms of the defence, namely, whether or not the defendants were tenants under the lease; but this issue only raises the plaintiff’s title to the possession generally. The defence here is in substance the old plea of *non tenuit*, and under that plea the plaintiff is bound to prove the contract as stated, namely that the defendants held under a lease: *Philpot v. Dobbinson* (a); whereas the issue raises the question generally as to the plaintiff’s right to the possession.

CRAMPTON, J.

You could have raised no other defences than those comprised in the present issues. The question is simply whether the landlord is entitled to recover possession. I would have set aside this defence, if it had been brought before me.

*Chatterton*, contra, was not called on.

*Per Curiam.*

Refuse the motion, with costs.

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*Chatterton* then applied for liberty to issue an *habere*. A consent for judgment has been given by some of the parties, signed by their attorney; but the officer feels a difficulty in issuing the

(a) 6 Bing. 104.

*habere*, owing to the provisions of the 223rd section of the Common Law Procedure Act.\* The present case does not, however, come under the terms of that section. It applies only to the case of a *sole* defendant, or *all* the defendants giving a consent for judgment, or to the case of one defendant defending separately for a portion of the premises; but it does not apply to a case where more than one of several defendants, who have taken defence for the whole of the premises, have given consents for judgments. As this section may have a mischievous effect, if no consent can be given unless under the hands of the parties to it, the Court will not be inclined to extend its strict provisions to cases not expressly within it.

E. T. 1854.  
*Queen's Bench*  
 MURPHY  
 v.  
 TOOHEY.

*Per Curiam.*

Take the order.

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\* 16 & 17 Vic., c. 113, s. 223, enacts, "That a sole defendant, or all the defendants in ejectment, shall be at liberty to confess the action as to the whole or part of the property, by giving to such plaintiff a consent for judgment, headed in the Court and cause, signed by the defendant or defendants, such signature to be attested by his or their attorney; and in case one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the plaintiff's title to such portion, he may give a like consent for judgment to the plaintiff."

### RUSSELL v. NELSON.

*May 10.*

W. DUGGAN moved that the appearance and defence filed by the defendant should be set aside. The action was brought for use and occupation; and the defence pleaded was, "that the defendant is not indebted in the sum in the summons and plaint mentioned, for the use and occupation of the premises, as he heretofore discharged the same.—*Held*, that such defence was bad, either as amounting to the general issue or to a defence of payment; and if the latter, the time and manner of payment should have been indorsed or specified.

To summons and plaint, for use and occupation, defendant pleaded that he is not indebted in the sum in the summons and plaint men-



E. T. 1854.  
*Queen's Bench*  
 RUSSELL  
 v.  
 NELSON.

"same." If this defence be taken to amount to a plea of *nil debet*, it is bad: *Dowling v. Wallace (a)*. If it be not considered to amount simply to the general issue, it must then be taken to amount to a plea of payment; and if it be a plea of payment, it is clearly not in conformity with the provisions of the 41st section of the Common Law Procedure Act, as the particulars of the alleged payment are not indorsed, or in any way specified, upon the defence, as required by that section, and by the form of the plea of payment given in the schedule to the statute.—[CRAMPTON, J. It certainly could not entail trouble on the defendant, if he specified in his defence when and where he paid the demand.—LEFROY, C. J. If the defendant had said he had paid "said sum," it might have been enough; but by the word "discharge" may be meant a payment by bill or release. There is no indorsement on the defence. Have you any affidavit on which you move?—We have sworn that the defence is untrue in fact.—[LEFROY, C. J. The truth or falsity we cannot discuss on motion.]

No Counsel appeared to resist the motion.

LEFROY, C. J.

The interpretation which has been put upon the words of the 41st section of the Act is borne out by the terms of the plea given in the schedule. After the word "discharged," come the words, "by payment of the said sum of £—, in the time and manner herein indorsed," which show that it is not sufficient for the defendant to say that he discharged the sum claimed, but that he must say that he discharged it by payment in the time and manner thereon indorsed. This defence is clearly a violation of this section of the Act, and we must therefore set it aside; but as the action has been brought for a small sum, we will say, no rule as to the costs of the motion.

Defence set aside—no rule as to costs.

(\*) 3 Ir. Com. Law Rep. 83.

E. T. 1854.  
*Queen's Bench*

## SPENCER v. CAMPION.

*May 4.*

R. R. WARREN, on behalf of the defendant, applied, that plaintiff be restrained from proceeding until he gave security for costs. The affidavit on which he moved stated that the defendant "is advised and believes that he has a good and legal defence on the merits."

An affidavit of merits, on belief that defendant had a good and legal defence on the merits—*Held*, sufficient to justify an order for security for costs; but an affidavit of merits, stating that the defendant had a just and valid defence at law upon the merits—*Held*, insufficient.

*West and Jordan*, contra.

An affidavit stating on belief is insufficient; the defendant ought to aver positively as to his defence, or state the reasons on which his belief is grounded.

CRAMPTON, J.\*

Certainly, under the old practice such an affidavit would have been sufficient, and I can see no reason why it should not be equally so under the new practice; many cases might be suggested, where a party could not positively aver as to merits. Considering the affidavit satisfactory, I will make the order.

\* *Solus.*

The wording of the 52nd section, "unless upon a satisfactory affidavit that such defendant has a defence upon the merits," has created a difference of practice in the Courts. In *Pordage v. Carter* (6 Ir. Jur. 236), the Court of Exchequer held that an affidavit that deponent is advised and believes that he has a good defence upon the merits, "was insufficient, because of its not particularising the ground, and that the affidavit should contain some specific averment of merits; and it is believed that this ruling has been adopted in the Court of Common Pleas. The Court of Queen's Bench, in a subsequent case—*Shaw v. Craig* (Trinity Term 1854)—held that they could abide strictly by their former ruling. In that case, *A. S. Crawford*, on behalf of the defendant, moved for security for costs, on the affidavit of the defendant, that he had "a just and valid defence at law upon the merits."

*Faloon*, contra, argued, that forms of affidavit were not within the previous decisions of the Court, as a man might have a valid defence at law, and not one on merits.

*Per Curiam*.†

The affidavit is not a proper one; the motion must be refused, with costs.

† The CHIEF JUSTICE and CRAMPTON, J.

E. T. 1854.  
*Queen's Bench*

POWELL v. PRICE.

May 8.

A plaintiff omitting the indorsement required by the 7th General Order is irregular, and such irregularity may be taken advantage of after the filing of the plaintiff; the filing of the plaintiff not amounting to a step taken after knowledge of the irregularity, under the 179th General Order.

T. O'HAGAN moved that the plaintiff issued in this cause, and the proceedings had thereon, be set aside for irregularity, inasmuch as the said plaintiff is defective; the portion of the indorsement directed by the 7th General Order, in addition to the indorsement required by the Common Law Procedure Act, having been omitted.

This is a clear irregularity: *Patterson v. Busby* (a). The plaintiff is for libel; and we could not have known of the irregularity until the writ was filed. The remaining branch of the rule is not applicable to such a cause of action.

*Byrne*, contra.

This application comes too late. The plaintiff was served on the 24th of April, and was filed on the 29th, and notice of this application was not served until the 4th of May; and by the 179th Rule, all applications to set aside proceedings must be made within a reasonable time, and not after a step taken with a knowledge of the irregularity. This application should have been made after the service and before the filing of the plaintiff. A reasonable time has been held to be computed from the time when the party complaining of the irregularity had the means of knowing it: *Seymour v. Maddox* (b). Here the party must be taken to have known of the irregularity on being served with the plaintiff: *Cox v. Tullock* (c); *Hinton v. Stevens* (d); and that practice has been adopted by the Court of Common Pleas, in the case of *Woodroffe v. Dimsdale* (e). The filing of the plaintiff ought to be deemed a waiver of the irregularity, and treated as a step taken under the 179th General Order, directing that no appli-

(a) 5 M. & W. 521.

(b) 1 Low. Max. & Poll. 543.

(c) 2 Dowl. 47.

(d) 4 Dowl. 263.

(e) 5 Ir. Jur. 239.

cation to set aside proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying, or the opposite party, have taken a fresh step.

E. T. 1854.  
*Queen's Bench*  
POWELL  
v.  
PRICE.

CRAMPTON, J.

I must take the day of filing the plaint as the day from which the *laches* is to be computed. I do not think that more than a reasonable time has elapsed, neither has a step been taken after a knowledge of the irregularity. I will allow the plaintiff to amend the writ, paying the costs of the application; the defendant to have the ordinary time to plead after amendment.

#### ALLARD v. RANAGAN.

*May 11.*

SHERLOCK, J. W., moved to set aside the defence in this case, as calculated to embarrass the plaintiff. The action was brought for the sum of £19. 11s. 6d., for goods sold and delivered. The defendant pleaded, that he was not indebted to the plaintiffs in the said sum, nor in any sum except the sum of £7. 18s. 3d., and that by consent, entered into with the plaintiffs, the defendant returned and delivered goods to the value of £7. 18s. 3d., the particulars whereof were indorsed thereon, which the plaintiff agreed to accept in discharge of said last mentioned sum.

The pleading of the defendant is too general, under the 70th section of the Act, which directs a denial of some one or more material matters of fact.—[MOORE, J. What injury can this defence do; does it not sufficiently deny the debt?] No; it violates the section of the Act; for a release, discharge or other defences, could be given in evidence under this issue, yet the Act expressly

Where, to an action for goods sold and delivered, the defendant pleaded as to part that he was not indebted, &c., and as to the residue, accord and satisfaction.—*Held*, that the defence was irregular and embarrassing, the plea of *not indebted* being too general.

E. T. 1854. directs them to be specially pleaded; the gist of the action is not the debt, but the sale and delivery of the goods. This defence has already been set aside: *Martin v. Roe* (a).—[LEFROY, C. J. What form of pleading is proper in such a case?]  
*Queen's Bench*—That the goods sold were of the value of £7. 18s. 3d., and no more, and accord and satisfaction as above as to that sum, or some other defence of a like nature, taking a special general issue.

ALLARD  
v.  
KANAGAN.

*Per Curiam.*

This is a very wild defence, and does not accord with the directions of the Act of Parliament; we will give the defendant leave to amend, on payment of the costs of the motion.

(a) 6 Ir. Jur. 244.

MORGAN v. POTTER.

May 11.

Where an action for false imprisonment had been instituted under the old practice, by summons and declaration, and a plea of the general issue had been filed, and verdict, judgment and rule on *postea* entered under that system, though the trial was not had until after the passing of the Common Law Procedure Act, and the plaintiff recovered but £5, and the Judge refused to certify that it was a fit case for the Superior Courts—

*Held*, that as the 14 & 15 Vic., c. 57, s. 40, which only entitles plaintiff to costs if he recover above £5, being in force at the institution of the action, though repealed previous to the trial, the defendant was entitled to the benefit of the section, and plaintiff was not entitled to costs.

HICKEY, on behalf of the defendant, applied for an order that the plaintiff in this action be declared disentitled to any costs, and that the officer of the Court be restrained from filling up the blank in the judgment had in this case on the roll. The action was brought against the defendant, as Sheriff of Kilkenny, for an alleged false imprisonment, and the jury having found a verdict for the plaintiff for but £5, the Judge refused to certify, so as to entitle the plaintiff to full costs. On the taxation the plaintiff claimed

costs, which the Taxing-officer refused; but he suggested that the case should be brought before the Court for his direction, as it was circumstanced peculiarly. The action had been begun before the Common Law Procedure Act, under the old system of writ of summons and declaration, and the plea, *venire* and *distringas* and rule on *postea* had been filed and entered under that system. The 14 & 15 *Vic.*, c. 57, s. 40, is unrepealed by the Common Law Procedure Act, and it is express that where the proceedings might have been by civil-bill, and the plaintiff recovers in any action of trespass, trover, or trespass on the case, &c., a sum not exceeding £5, the plaintiff shall not be entitled to any costs, unless at the trial of such cause the Judge shall certify on the back of the record that it was a fit case for the Superior Courts. It will be contended that under the Common Law Procedure Act the plaintiff is entitled to half costs; but inasmuch as this action was begun before that Act passed, and the 40th section of 14 & 15 *Vic.* is in force as affecting actions began before the Act, we say the proceedings cannot be affected by the Procedure Act. The 3rd section of the Procedure Act enacts—"That from and after the commencement of this Act, the several Acts and parts of Acts set forth in the schedule A to this Act annexed, so far as the said Acts, or any parts of any Act relate to personal actions, or actions of ejectment in the Superior Courts of Law in Ireland, and no further or otherwise, and to the extent to which such Acts, or parts of Acts, are by such schedule expressed to be repealed, are hereby repealed, except as to any thing done before the commencement of this Act, and except so far as may be necessary for the purpose of supporting and continuing any proceedings heretofore taken upon any action brought before the commencement of this Act," &c. The 243rd section directs a schedule of fees and costs, and contains the proviso—"That in case the plaintiff in any action of contract (except for breach of promise of marriage) shall recover, exclusive of costs, less than £20, or in any action for any wrong or injury disconnected with contract (except replevin, or for slander, libel, malicious prosecution, seduction, or criminal conversation), a sum not exceeding £5, the plaintiff in any such

E. T. 1854.

*Queen's Bench*

MORGAN

v.

POTTER.

E. T. 1854. "action shall be entitled to no more than one-half of the ordinary  
*Queen's Bench* "costs, unless the action has been brought for the purpose of trying  
 MORGAN "a right to property more extensive than the sum sued for."  
 v.  
 POTTER.

The repeal of the 40th section of the Civil-bill Act does not affect proceedings taken before the commencement of the Procedure Act. The plea in this case was the general issue, which we could not plead under the Common Law Procedure Act; so that declaration, defence, *postea* and rule on *postea* were all done under the old system; and plaintiff, having recovered but £5, is not entitled to any costs.

*J. E. Walsh, contra.*

That 40th section of the Civil-bill Act is entirely repealed, and parties are to be dealt with under the new system.—[CRAMPTON, J. Do you claim half costs?—We claim half costs; but assuming the matter to be *res integra*, we say the 243rd section does not apply, and we are entitled to full costs, for the right to costs cannot come within the words "any thing done," in the 3rd section.—[PERRIN, J. Is not the commencement of the action a thing done?—*Commissioners of Public Works v. Ryan* (a) was a case commenced before the passing of the Procedure Act, and yet it was there held judgment must be entered pursuant to the new Act.—[CRAMPTON, J. That case does not touch the 40th section of the Civil-bill Act: here the trial and verdict were had and obtained under the old practice; and was not that a continuance of existing proceedings within the 3rd section?—MOORE, J. Do you think the table of fees in the schedule to the Act applies to your case?—We consider it does not: the general rule of the Judges, by the 243rd section directed to be made, applies; but not the repeal, for in no case could the costs prescribed by the Common Law Procedure Act be taxed in reference to a pending cause, except so far as might be necessary to support proceedings under the Act. The old statute of G. 3, as to entering up judgment in case of nonsuit, is repealed by the Procedure Act, just as the 40th section of the Civil-bill Act is repealed; and yet in that case in the Exchequer, the Court have held that the judgment may be entered up pursuant to the new

(a) 6 Ir. Jur. 140.

statute. Analogous decisions on the construction of statutes apply: *E. T. 1854. Freeman v. Moyes* (a); it was there held that executors are liable to costs in actions commenced before the statute (3 & 4 W. 4, c. 42, which first rendered them liable) came into operation, and tried afterwards.—[MOORE, J. You are entitled to full costs or none.]—A statute, simply repealing an old statute, has the effect of leaving that old one just as it was in reference to existing proceedings: *Sartees v. Ellison* (b).—[MOORE, J. The case depends on that exception in the 3rd section.—CRAMPTON, J. A portion of the proceedings was taken before the passing of the Procedure Act, and the continuation of them was to support the existing proceedings—the very state of facts provided for by the 3rd section.]—The non-payment of costs is not necessary for the continuation of existing proceedings, nor is the continuance of the 40th section of the Civil-bill Act necessary either, and the 243rd section of the Procedure Act aids this view; for if that section began at the words “provided always,” it would override the whole Act.—[CRAMPTON, J. So it does; that proviso overrides the Act, and reduces this question to one of whole costs or none.—MOORE, J. The words in the 3rd section are comprehensive enough to include the case.]

E. T. 1854.  
*Queen's Bench*  
MORGAN  
v.  
POTTER.

LEFROY, C. J.

Without calling on the other side, we must grant this application; but as the question was one legitimately open to discussion, we say no costs.

CRAMPTON, J.

The notice of motion is, however, incorrect; it should have been for a direction that the Taxing-officer do not tax any costs of these proceedings.

(a) 1 Ad. & Ell. 338.

(b) 9 B. & C. 750.



E. T. 1854.  
*Queen's Bench*

NEVILLE v. HYLAND.

*May 6.*

A defence to a writ of summons and complaint, complaining of a breach of covenant for non-payment of rent, stating that defendant had agreed for a certain consideration to accept, and had accepted, an abated rent, and that the sum demanded was a violation of the agreement; and further pleading that the only sum due was £60, which defendant brought into Court:—  
*Held* bad, because it did not allege whether or not the agreement was under seal.

H. SMYTHE, on behalf of the plaintiff, moved that the defence in this cause be struck out, upon the ground that same was ambiguous and uncertain, in not stating distinctly whether the agreement of the 27th of March 1852, in the said defence stated, was under seal, or how otherwise, and was valid and binding; and that said defence was in this respect so framed as to embarrass and prejudice the fair trial of the action; and as the sufficiency of the payment into Court, pleaded in said defence, could not be fairly tried upon any issue raised for that purpose.

The plaint was filed, alleging a breach of covenant in a lease, for non-payment of the annual rent of £170. To this the defendant pleaded that in October 1851, he (the defendant) assigned his interest to one Daniel Headon, and that the plaintiff accepted Headon as his tenant, and received rent from him; and that after such assignment, and before any portion of the rent demanded by the plaintiff became due, the plaintiff, in consideration of a pony delivered by the said Headon to the plaintiff, agreed that in future the yearly rent on said lease should be £120, and that he had received the sum of £60 in satisfaction of one half-year's rent, and that the sum demanded extra that amount was a violation of this agreement, and that the only sum due was the sum of £60, which he, defendant, brought into Court. This is pleaded in discharge of the covenant, and is not averred to be an agreement under seal, and money having been paid into Court under the 74th section of the Procedure Act, and pleaded accordingly, the 78th section confines the issue in such case to the sufficiency of that payment; whereas in order to raise the true question in this case between the parties, the issue should be, whether that agreement pleaded was under seal?

*R. Armstrong, contra.*

The issue tendered is a sufficient and valid one, and raises a fair question, on the decision of which circuitry of actions will be avoided.

E. T. 1854.

*Queen's Bench*

NEVILLE

*v.*

HYLAND.

CRAMPTON, J.

The defendant is bound to allege, with specific certainty, whether this agreement pleaded be or not under seal; he cannot compel the plaintiff to go to trial without informing him whether that be so, or whether it be an agreement by parol. The defendant may amend his plea in this respect on payment of costs.

Let the defendant, within two days, amend his defence as he may be advised, and pay the costs of the motion.

M'DONOUGH *v.* MACARTNEY, M.P.

T. T. 1854.

*June 1.*

PERRIN, on behalf of the plaintiff, moved that the service had of the writ of summons and plaint in this cause might be deemed good service on the defendant, a Member of Parliament. The affidavit stated that the summons and plaint issued on the 18th of May 1854, and that on the 22nd of May 1854, deponent went to Lowther Lodge, in the county of Dublin, the residence of the defendant, for the purpose of serving him with the writ, and that on arriving there he met James Cahill, the manager of the defendant, who told deponent—and which information deponent believes to be true—that the defendant was not then in Ireland, but was attending his parliamentary duties in London; and that he thereupon handed to the said James Cahill a true copy of the said writ of summons and plaint, duly sealed, and truly indorsed with the particulars of the plaintiff's demand in this cause, and

The temporary absence of a defendant out of the jurisdiction, if for example, attending Parliament, is not ground to justify a substitution of service.

T. T. 1854. showed unto him at the same time the said original writ, and *Queen's Bench* desired him to give to the said George Macartney the said copy.

M'DONOUGH

v.

MACARTNEY PERRIN, J.

This Court does not consider temporary absence from the country sufficient reason for the substitution of service. When an application is made for that purpose, pending such temporary absence, the affidavit to ground it ought to show some pressing cause for commencing the action. None such is specified here, and therefore—

No rule.

### COCK v. MAHONY.

June 2.

To a writ of LEAHY, on behalf of the plaintiff, moved to set aside the defence summons and filed in this case, inasmuch as it amounted to the general issue, and goods sold and inasmuch as the summons and plaintiff being grounded on a contract, delivered, the defence did not traverse any one matter of fact in the summons goods bargained and sold, and on an account stated, and plaintiff alleged. The plea was for goods sold and delivered, and an account stated. The defence put in defendant bargained and sold, and on an account stated. The defence put in pleaded that he "is not and never was indebted to the plaintiff, in respect of the several causes of action, or any of them, in the summons and plaintiff mentioned. Held, that such defence was no traverse of any one fact in the summons and plaintiff men- fact.

fact.

*Coffey*, contra.

This defence goes to the root of the action, and this Court held it good, in a case of *Martin v. M'Hugh* (a).—[LEFROY, C. J. That case is not accurately reported; for in that case the defence answered the specific cause of action—a very different one from the present—for, consistent with this defence, you might say you never bought, or plaintiff never sold, any of the goods, or that there was no account ever stated between them. You should not be allowed to plead in wider terms than what the plaintiff states. You cannot now give in evidence, under general terms, special facts.—MOORE, J. By alleging he never was and is not indebted, defendant might fail on one issue and succeed on the other.]—We could not prove payment or a release under that defence; the plaint has one cause of action for goods sold and delivered, goods bargained and sold, and the account stated, and we traverse the action by one comprehensive denial.—[PERRIN, J. It is difficult to comprehend what you mean by saying defendant never was indebted in respect of the goods sold. The defence should be that defendant was not indebted for goods sold and delivered, or goods bargained and sold, or on an account stated.]

T. T. 1854.  
*Queen's Bench*

COCK  
v.  
MAHONY.

*Per Curiam.*

Let the defence be amended, on payment of costs.

(a) 6 Ir. Jur. 279.

# DICKSON v. DENROCHE.

June 14.

MACDONOUGH (with him *Heron*) moved, on behalf of the plaintiff, to rescind the order made in this case, granting a special jury under the old system. The Court will refuse an application for a special jury in a case where no grounds are shown for its necessity, especially as it is made on an *ex parte* application.

The order for a special jury under the old system may be made *ex parte*.

T. T. 1864.

*Queen's Bench*DICKSON  
v.

DENROCHE.

*Hemphill*, contra.

This order was obtained under the 112th section of the Procedure Act, providing "that the Court or a Judge, in such case as he or they may think fit, may order that a special jury be struck according to the present practice; and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause." No notice of the application was necessary, and the rules subsequent to the Procedure Act are silent on the subject: *Fleming v. Taylor* (a); *Weir v. Weir* (b).

LEMMOY, C. J.

This is an application to set aside an order made under this Act of Parliament, enabling a plaintiff or defendant to have a special jury under the former practice of the Court—the granting of that order being clearly in the discretion of the Court. If we review that order, we should have constant applications questioning orders, the making of which, being discretionary, ought not to be appealed from.

As to the want of notice, there is no general rule on the subject, and the practice hitherto followed has dispensed with the necessity of notice. This motion must therefore be refused.

Motion refused; no costs.

(a) 3 Ir. Com. Law Rep. 75.

(b) 6 Ir. Jur. 143.

H. T. 1853.

*Circuit case.*

## SHINNER v. HARMAN.\*

*(Circuit case.)**March.*

THIS was a special case stated for the opinion of the Judge, on appeal, pursuant to the 138th section of the 14 & 15 Vic., c. 57. The process was for the alleged conversion of a threshing-machine and steam-boiler, which the plaintiff alleged had been illegally removed by the defendant from the farm of Cloughlucas, in the county of Cork. The Assistant-Barrister, on the hearing of the case, gave a decree for the plaintiff for £16, being in the proportion of £12 for the removal of the threshing-machine, and £4 for the removal of the steam-boiler.

The case stated that the defendant held the lands of Cloughlucas, under a lease dated the 12th of February 1839, made to him by one Edward Nagle Connellan, for the term of three lives, some of which were still living, and sixty-one years in reversion. Edward Nagle Connellan was himself seised of the lands at the time he made the lease to the defendant, under a deed of the 30th of December 1836, executed to him by John Shinner, the father of the plaintiff, for a term of three lives, with a covenant for perpetual renewal. By a decretal order, made by the High Court of Chancery in Ireland, in a certain petition matter wherein the plaintiff was petitioner, and Richard Connellan, eldest son of the said Edward Nagle Connellan, who had previously died, Edward Sherlock, Richard Wynne and Robert Murray, were respondents, but to which petition matter the present defendant did not appear to be made a party, it was declared that the said indenture of the 30th of December 1836 was fraudulent and void as against the petitioner; and that under the

A tenant, while in possession under his lease, set up for agricultural purposes a threshing-machine and steam-boiler. The threshing-machine was fastened to four bolts, fixed in the ground, but was capable of being detached from them by unscrewing four nuts at the end of the bolts and removing the shaft of the machine, which passed through the wall of the house, both of which could be done without injury to the freehold. The steam-boiler was set in brick-work, which rested on the floor in the corner of the out-house, and touched both walls, but was capable of being removed by detaching the upper tier of the brick-work, without

injury to itself or the out-house—*Held*, that the threshing-machine and steam-boiler were not fixtures as between landlord and tenant, and that the tenant was entitled to them as removeable chattels

\* *Coram BALL, J.*—(Cork Spring Assizes, 1853.)

H. T. 1853.  
*Circuit case.*  
SHINNER  
v.  
HARMAN.

provisions of a certain settlement of the 15th of August 1811, the plaintiff, on the death of his father, became entitled to the premises comprised in a certain deed of the 2nd of September 1794, which it was admitted comprised the premises demised as aforesaid to the defendant; and it was further ordered that the respondent Richard Wynne should execute to the plaintiff a deed of re-conveyance of the premises comprised in the indenture of the 2nd of June 1794, discharged from all intervening incumbrances created by John Shinner the elder, or by Edward Nagle Connellan, or either of them, or by any person claiming under any of them; and that an injunction should issue, to put the plaintiff in possession of the premises comprised in the indenture of the 2nd of June 1794. While the defendant was in possession, under the demise of the 12th day of February 1839, he, at his own expense, set up a threshing-machine on the premises comprised in his lease, and erected over it a house or shed, for the purpose of containing, preserving and working it properly. The threshing-machine was set up in the following manner:—A large round stone was fixed in the ground, outside the house which was built for the threshing-machine, through which four iron bolts were passed through holes in the stone, four feet apart; these stood perpendicularly, and were fastened at one end into the stone, and, at the upper end, there were nuts which screwed on. A metal frame was then placed upon the stone, through which these four bolts passed, and the frame was then secured by the nuts, which were screwed down on the iron bolts. This frame was removeable by unscrewing the nuts, without destroying or injuring the bolts and stones. From this frame a shaft of iron, about fourteen feet long, called the spindle, and which worked the machinery which was inside the house, passed through a hole in the wall, but was not in any way connected with the wall. The machine itself was inside, and was fastened by wooden pins to four pieces of timber, let into the ground in such a manner that by taking out the pins it could be removed without injury to the house or the timber work into which it was thus inserted. The defendant also, while in possession under the lease, put up in the

corner of one of the out-houses, on the demised premises, a steam-boiler, which was set in brick-work; the brick-work touched both walls, and was built on the floor; the boiler was set in the brick-work, with mortar, but in such a manner that by removing some of the bricks of the front wall, the boiler could be removed without injury to itself or the out-house.

H. T. 1853.  
*Circuit case.*  
 SHINNER  
 v.  
 HARMAN.

It was proved by William Foley, the agent of the plaintiff, that he went with the injunction to the lands of Cloughluca, which comprised those in the possession of the defendant, in company with the Sheriff, for the purpose of taking possession thereunder for the plaintiff, and that on proceeding to execute the injunction, possession was formally delivered to him, by the defendant, of the said lands, and the out-houses and offices built thereon; but the defendant, having requested liberty to remain in the house for the purpose of removing his goods, it was agreed between the defendant and the said W. Foley, acting upon behalf of the plaintiff, that the defendant should be at liberty to continue in possession for a fortnight, and should be allowed within that time to remove any goods belonging to him from the premises. Before the fortnight expired, the defendant removed the threshing-machine, by unscrewing the four nuts at the heads of the iron bolts, which fastened it outside, and taking out the four wooden pins which connected it with the four pieces of timber inside, leaving the stones, the four iron bolts and four pieces of timber in the house undisturbed and uninjured; and also removed the steam-boiler, by taking away the front upper tier of bricks, leaving the rest of the brick-work standing.

The question stated for the opinion of the learned Judge was, whether, under the foregoing circumstances, the defendant was entitled to remove the said threshing-machine and steam-boiler, or either of them? The Court to be at liberty to reduce the amount of the decree, according to the value so affixed to each, in case it should be of opinion that the defendant was entitled to remove either; and in case the Court should be of opinion that he was entitled to remove both, then the case to be dismissed on the merits.



H. T. 1853.

*Circuit case.*

SHINNER

v.

HARMAN.

*Jellett*, for the appellant.*Sullivan*, for the respondent.

The cases cited will be found fully noticed in the judgment.

The learned Judge said he should consider the question, and afterwards delivered out his judgment as follows :—

Upon this appeal two questions arise—First, whether the threshing machine and steam-boiler, described in the case sent by the Assistant-Barrister, are to be deemed fixtures as between landlord and tenant?—Secondly, assuming them to be such—whether the tenant was entitled to remove them at the expiration of his tenancy?

Taking the second question, in the first instance, I should state that I am led to infer from the contents of the case sent by the Assistant-Barrister, that the threshing-machine was erected for agricultural uses *alone*, and not at all for trading purposes. But as to the steam-boiler, I am unable to collect whether it was set up for agricultural or domestic purposes. If it were for the latter, I should hold that it was removable by the tenant, even though a fixture, on the principle upon which grates, stoves, ovens, and such like articles of domestic use, may be removed by the tenant, although they may have been affixed by him to the soil, or to the structure of the building wherein he has placed them. But considering both the threshing-machine and the steam-boiler as erected for agricultural purposes *alone*, which may probably be the fact, I must observe that the case of *Elwes v. Mawe* (a) appears to have established the general doctrine, that although fixtures erected for the purposes of trade may in many cases be removed by the tenant who has constructed them, the same right does not belong to the tenant, at least to the same extent, in reference to erections made by him for agricultural uses alone. However, it is to be observed, that in that case the erections consisted of buildings having their foundations sunk in the soil, and therefore permanently affixed to the freehold, and incapable of being removed by the tenant without being utterly destroyed. Accordingly, if it were necessary for me

(a) 3 East, 38.

to decide whether the case of *Elwes v. Mawe* were an authority to rule the present, I should have to consider whether, regard being had to the character of the articles which were removed by the tenant in this case, as well as to the limited extent of their connection with the building, the principle upon which *buildings* constructed for agricultural purposes were ruled in that case not to be removable by the tenant, was applicable to the case now before me. However, I do not find it necessary to enter upon the consideration of that matter, as I am of opinion, upon the preliminary question above mentioned, that the threshing-machine and steam-boiler were not fixtures according to legal intendment, as between landlord and tenant, but were removable chattels, the property of the tenant, and which he was entitled accordingly to carry away at the expiration of his tenancy.

H. T. 1853.  
Circuit case.  
SHINNER  
v.  
HARMAN.

It had been held in the case of *Culling v. Tunell* (a), that a tenant who had erected a barn on the demised premises, and placed it upon pattens and clocks of wood lying on the ground, *but not fixed in or to the ground*, might, by the custom of the country, remove the structure at the end of the term.

Lord Ellenborough, in commenting upon that case, in his judgment in *Elwes v. Mawe*, makes this observation:—"To be sure the tenant might take it away, and that without any custom, for the terms of the description exclude it from being considered a fixture; *it was not fixed in or to the ground.*" Accordingly we find that in *Rex v. Otley* (b), it was determined that a wooden mill constructed by a tenant on a foundation of brick, whereon it rested by its own weight, without being otherwise attached to it, was not a fixture, and might be removed by the tenant.

This decision was followed in *Wansborough v. Maton* (c), where it was held that a tenant was entitled to remove a barn, resting, as in the last case, on a foundation of brick constructed by him; and *that*, although he had to dig into the soil in order to sink the foundation whereon the barn rested. In that case, Littledale, J., in his judgment, was disposed to carry the right of the tenant

(a) Bull. N. P. 34.

(b) 1 Barn. & Ald. 161.

(c) 4 Ad. & Ell. 884.

H. T. 1853. still further. "Suppose," he said, "holes had been made in the  
*Circuit case.* "wooden part of the barn, or grooves constructed so as to fix the  
 SHINNER "barn on the brick foundation, I do not know that the barn when  
 v. "so fixed might not be removed by the tenant, *since it could be*  
 HARMAN. "*done without injuring the freehold.*"

This suggestion would appear to be warranted by the consideration that the effect of steadying the barn, by means of the holes or grooves, would be no more than what would arise from its being steadied by its own weight if sufficient, or, if not, by means of heavy weights of metal or other substance placed upon it for the purpose; and, accordingly, in *Trappes v. Harter* (a), Counsel having observed that although the general rule may be that a tenant who puts up may remove during his term, yet, in the case then before the Court, the articles were firmly fixed to the freehold, Lord Lyndhurst remarked "No doubt they were; but the screwing of a stocking-frame to a floor to keep it steady does not make it a fixture."

The doctrine suggested *arguendo* by Littledale, J., and Lord Lyndhurst respectively, in the two preceding cases, was acted on judicially by the Court of Common Pleas in *Grymes v. Boweren* (b). In that case a tenant was held entitled to remove a pump which he had erected on the demised premises, although the shaft of it passed through a brick flooring into a well beneath; also the upper part of the shaft had been attached to a plank which was fastened by an iron bolt or pin to a wall; and the pin, which had a head at one end, and a screw at the other, passed entirely through the wall. It appeared also that the tenant, in withdrawing the shaft of the pump from the well, through the brick flooring, had displaced four or five of the bricks. Under these circumstances, Tindal, C. J., in giving judgment, enumerated, among others, as a ground of the decision, the fact that the pump was but "*slightly affixed* to the freehold, and *could be removed entire.*" On the same principle it was determined, in *Davis v. Jones* (c), that certain structures denominated "Jibs," which had been erected by a tenant, were removable by him, inasmuch as though fas-

(a) 3 Tyr. 619.

(b) 6 Bing. 438.

(c) 2 Barn. &amp; Ald. 165.

tened to the buildings by pins, they were capable of being removed without injury to the buildings or to themselves. Finally, in *Hellawell v. Eastwood* (a), the foregoing principles were acted on, and, as it appears to me, satisfactorily established.

H. T. 1853.  
Circuit case.  
SHINNER  
v.  
HARMAN.

The question there was, whether certain cotton-spinning machines, some fixed by screws into the wooden floor, and others fixed by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured upon them, were distrainable by the landlord as moveable chattels belonging to the tenant? And it was determined that they were so. It had been insisted in argument that these erections were fixtures; and in reference to this, Parke, B., in delivering the judgment of the Court, observed:—  
“Before they had been attached to the floor in the manner above described, they had been mere chattels, and the question is—did they lose that character by being attached to the floor? Did they become, by being thus attached, parcel of the freehold?” There are two principal considerations to be attended to in reference to this question:—First—“The mode of annexation to the soil or fabric of the house, and the extent to which the machines became united to it—whether they could be easily removed *integro, salvo et commode*, without injury to themselves or to the fabric of the building?”

“Secondly—What was the object and purpose of their annexation to the soil or building?—whether was it for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, ‘*perpetui usus causa*,’ or in that of the Year-book “(20 Hen. 7, c. 13) ‘*pour un profit de l’inheritance*?’ Or, on the other hand, was it for a mere temporary purpose, or the more complete enjoyment and use of the articles as chattels? Now here we cannot doubt that the machines in question never became part of the freehold; they were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object or purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier, and more capable of convenient use

(a) 6 Exch. Rep. 295.

H. T. 1853.  
*Circuit case.*  
 SHINNER  
 v.  
 HARMAN.

"as chattels. They were never a part of the freehold, any more  
 "than a carpet would be which is attached to the floor by nails for  
 "the purpose of keeping it stretched out—or curtains, pictures,  
 "looking-glasses, and other matters of an ornamental nature which  
 "are slightly attached to the walls of a dwelling-house as furni-  
 "ture."

I have made this long extract from the judgment of Park, B., because it appears to me to embody all the principles of law applicable to the present case, which are to be found scattered through other cases as they have been from time to time adopted in practice. I should observe that in that case, as in some of the others to which I have adverted, the structures which were held not to be fixtures had been erected for trading or manufacturing purposes, and, in one instance, for domestic use; and consequently, on the principle of the decision in *Elwes v. Mawe*, were more favourably circumstanced in respect to their removability by the tenant, than if—as in this case I assume they were—they had been constructed for agricultural purposes alone. But the principles upon which it was held in those cases that the structures then under consideration were not fixtures appear to be plainly applicable to fixtures *generally* as between landlord and tenant, and consequently to rule the present case, as well as in respect of the threshing-machine, which was fastened only temporarily by screws, and was capable of being removed entire, and without injury either to itself or to the fabric of the building, as likewise to the steam-boiler, which, though set in brick-work laid upon the floor, was capable of being withdrawn from its position whole and entire by the mere removal of the upper part of the brick-work of the front wall; which, upon the authority of the foregoing cases, I must consider as not such an injury to the structure of the building as should deprive the steam-boiler of the character of a removable chattel, which it would otherwise have borne.

I therefore reverse the decree of the Assistant-Barrister, and dismiss the case on the merits.

T. T. 1854.  
*Common Pleas.*

## JOHNSTON

v.

## MIDLAND GREAT WESTERN RAILWAY COMPANY.

*May 27.*

J. CLARKE, for the defendants, moved that the taxation of the costs in this cause should be reviewed, so far as regards the costs of a special jury.

The action had been commenced before the 1st of January 1854. The defendant had obtained an order for a special jury, which had been struck accordingly; and the plaintiff afterwards entered a rule to discontinue. On the taxation of costs, the Taxing-officer refused to allow the defendant the costs of the special jury.

Under the 27th section of the 3 & 4 W. 4, c. 91, the defendant would have been entitled to such costs if he had obtained a verdict, and if the Judge had certified that it was a proper case for a special jury. The plaintiff, by his rule to discontinue, prevented the defendant from going to trial; and the rule to discontinue expressly obliged the plaintiff to pay the defendant all the costs he has incurred.

In an action commenced before the 1st of January 1854, the defendant had obtained an order for a special jury, which was struck accordingly. The plaintiff afterwards entered a rule to discontinue. — *Held*, that the defendant was entitled, as against the plaintiff, to the costs of the special jury.

*Lawson, contra.*

The words of the 27th section are, "That the party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such party would have been entitled unto in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried shall immediately after the trial certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." Therefore, the only case in which a party applying for a special jury can get back his costs, is where he gets

T. T. 1854. a verdict in his favour, and the Judge certifies; such a contingency  
*Common Pleas.* can never occur where no trial takes place.

JOHNSTON

v.

MID. GT. W.  
RAILWAY  
COMPANY.

MONAHAN, C. J.

This motion must be granted. The 27th section of the 3 & 4 W. 4, c. 91, provides, that if the case goes to trial, the party applying for a special jury can recover the costs of such special jury only in case of his getting a verdict, and the Judge certifying that it was a proper case for a special jury; but if the other party, by means of a rule to discontinue, prevents him from going to trial, and thereby deprives him of the opportunity of getting a verdict, and certificate entitling him to his costs, we do not think there is any thing in the Act depriving the party so prevented of obtaining his costs.

Motion granted, without costs.

#### ROCHE v. WILSON.

May 27.

Where a summons and  
plaint was  
served on the  
9th of May,  
and the defend-  
ant on the 23rd  
day of the  
same month  
served a notice  
of motion to  
set it aside for  
irregularity, as  
not containing  
a sufficient  
description of  
the plaintiff's  
residence, the  
Court *Held*,  
that the appli-  
cation was too  
late.

HEMPHILL moved to set aside the summons and plaint in this case, on the ground that it did not contain a sufficient description of the plaintiff. The writ of summons and plaint was served on the 9th of May, and the notice of the present motion served on the 23rd of the same month. The plaintiff was described merely as "wine merchant of Dublin," without naming any street or particular residence. —[MONAHAN, C. J. Does your affidavit state that you are at a loss to discover the residence of the plaintiff?—It does not go so far as that; nor is it necessary: *Cotton v. Sawyer (a)*.—[MONAHAN, C. J. Is not this application too late? *Ross v. Sandell (b)*.—Counsel cited *Price v. Powell (c)*.

*E. M. Kelly*, contra, was not called on.

(a) 10 M. & W. 328.

(b) 7 C. B. 766.

(c) 6 Ir. Jur. 277.

MONAHAN, C. J.

We need not in the present case decide the abstract question as to whether it is necessary to state the particular street in which the plaintiff resides, where he lives in a city or town; for it is at most a mere irregularity, and the defendant's affidavit not stating that he is at any loss to discover the plaintiff's residence, it is plainly a verbal or technical error or omission, within the terms of the 16th section of the Common Law Procedure Act; and we are of opinion that a party, in order to avail himself of such an irregularity, which he does not even say is calculated to mislead him, ought to do so as early as possible. Here it appears that the writ was served on the 9th of May, and the notice of the present motion was not served until the 23rd; and the plaintiff would now, if this application were granted, be thrown out of a trial until November. We therefore think that this application is entirely too late, and must be refused, with costs.

Motion refused, with costs.

T. T. 1854.

*Common Pleas.*

ROCHE

v.

WILSON.

## FITZGERALD v. BROWN.

June 1.

EXHAM moved that the summons and plaint in this case be set aside, upon the grounds that it was not indorsed in conformity with the 7th General Order. By that Order every summons and plaint should be indorsed as follows:—"N. B.—This writ is to be served within six calendar months from the date thereof, including the day of such date, and not afterwards."

In *Price v. Powell* (a), it was decided that the omission of  
 ledge of the irregularity, under the 179th General Order.

(a) 6 Ir. Jur. 277.



T. T. 1854. *Common Pleas.*  
FITZGERALD  
v.  
BROWN.

the indorsement required by the 7th General Order is an irregularity for which the proceedings are liable to be set aside; and the Court held that the filing of the writ did not amount to a fresh step after knowledge of the irregularity.

*Kernan*, contra.

The application is too late. The writ was served on the 20th of May, and filed on the 27th, and on the 29th notice of this motion was given. Therefore the defendant allowed another step to be taken; and according to the 179th General Order, this application is too late. But if the motion must be granted in any form, we would prefer to have the writ set aside, as we could then bring our action in the country.

MONAHAN, C. J.

We think that if a party wishes to take advantage of an irregularity such as this, he ought to give notice of it at once; and that he might give notice of the irregularity in the copy, without waiting for the original writ to be filed: still, as it is not the practice to give notice of the filing of the writ, which may be filed immediately after the service of the copy, we do not think that the defendant having allowed the writ to be filed amounted to allowing a fresh step to be taken. Accordingly, let this summons and plaint be set aside, and let the plaintiff pay £3 for costs.

Motion granted, with costs.

T. T. 1854.  
*Common Pleas.*

## CONNOLLY

v.

## THE DUBLIN AND DROGHEDA RAILWAY.

June 2.

**COFFEY** moved that the defence in this case be set aside, and that the plaintiff be at liberty to mark judgment, upon the ground that the defence was framed so as to embarrass the plaintiff, and prevent the fair trial of the action—the said plea not disclosing any defence which would enable proper issues to be tendered for the trial of the case.

This was an action brought against the Railway Company for injuries done to the plaintiff's dwelling-house, by the cutting down of a road, and by cutting off the ordinary approach to the plaintiff's house.

The plea was that the defendants had cut down and lowered the road, and did the other works in the plaint mentioned to have been done by them, in pursuance and under the provisions of the Dublin and Drogheda Railway Company Act, 1850, and of the several statutes incorporated therewith; and that, if the said dwelling had been injuriously affected, the plaintiff ought to have pursued the remedy in that behalf by the said enactments provided, and had no right to resort to this Court.—[**TORRENS, J.** This is analogous to cases under the Drainage Act, and in such cases it has been held that no proceedings could be taken except under the provisions of the Act.]—This plea does not enable the plaintiff to join in any proper issues. The plea is in effect a demurrer.—[**MONAHAN, C. J.** No; it is an allegation of a legal right under a statute.]

In an action against a Railway Company, for injuries done to the plaintiff's house, the defendants pleaded that the alleged injuries were committed under the provisions of a certain Act of Parliament, and the plaintiff should have pursued the remedy given by that Act. The plaintiff having applied under the Common Law Procedure Act (16 & 17 Vic., c. 113), to have the plea set aside as embarrassing, the Court refused the application, and said that the plaintiff's course was to demur to the plea.

*Ferguson*, for the defendants, was not called on.

**MONAHAN, C. J.**

We cannot set aside this plea. It is on the face of it a good plea,

T. T. 1854. *Common Pleas.* if correct in point of law; if it be not correct in point of law, the plaintiff's course is to demur, and, if he succeeds in that demurrer, he will be entitled to final judgment, no other plea having been pleaded.

CONNOLLY  
v.  
DUBLIN AND  
DROGHEDA  
RAILWAY.

Motion refused, with costs.

### HARRISON and others v. LYNCH.

June 2.

Where, in an action commenced after the 1st of January 1854, the plaintiffs applied for liberty to strike a special jury under the former practice (3 & 4 W. 4, c. 91), on the ground that it was desirable to have jurors of experience in a particular trade, and also that the plaintiffs, being Englishmen, were unknown to any of the jurors usually returned on the special jury panel of the county of the city of Dublin, the defendant being a citizen of Dublin: the Court refused the application with costs.

HEMPHILL, on behalf of the plaintiffs, moved for liberty to have a special jury struck according to the practice before the 1st of January 1854, and pursuant to the provisions of the 3 & 4 W. 4, c. 91.

This was an action for non-acceptance by the defendant of 449 chests of tea sold to him by the plaintiffs, in consequence of which the goods had been re-sold at a loss. In the affidavit on which this motion was grounded, it was stated that it would be important to have jurors of the greatest intelligence and experience in the wholesale tea trade, as many questions would necessarily arise on the trial as to the usages of that particular branch of trade; that the plaintiffs were Englishmen, and not personally known to any of the jurors ordinarily returned on the special jury panels for the county of the city of Dublin—while the defendant was a citizen of Dublin, and connected in the way of business, or otherwise, with a great number of such jurors; and that a trial could be more satisfactorily had by a special jury struck under the 3 & 4 W. 4, c. 91, than by one struck under the new system.

At the time of this motion, the special jury panel under the Common Law Procedure Act, to be used at the ensuing After-sittings, had not been struck. Counsel cited an unreported case of *Weir v. Weir*, and *Barron v. The West of England Insurance Company* (a).—[MONAHAN, C. J. That was a very special case.

(a) 3 Ir. Com. Law Rep. 112.

The venue was laid in the county of a city, in which, as appeared by the affidavits in the case, the plaintiff's family were possessed of considerable personal influence, and several of the plaintiff's relatives and friends were on the panel. The present case is very dissimilar.]

T. T. 1854.  
*Common Pleas.*  
HARRISON  
v.  
LYNCH.

*D. C. Heron*, contra, was not called on.

*Per Curiam*.\*

All applications of this kind, to strike special juries according to the old practice, must be decided upon their own respective merits, according to the circumstances of each case. If we were to grant the present motion, then every plaintiff in a particular trade, or every Englishman suing here, might make a similar application. The plaintiff here does not even swear that he believes that he is not likely to have a fair trial before a special jury struck under the Common Law Procedure Act; and there is no reason for supposing that he will not have as impartial a trial before such a special jury as before one struck under the former practice. Therefore this motion must be refused, and with costs; for we are not in the habit of making the costs of a collateral motion, like this, costs in the cause.

Motion refused, with costs.

\* MONAHAN, C. J., TORRENS, J., JACKSON, J.

E. T. 1853.

Common Pleas.

April 18, 23.

May 6.

CARR v. HARPUR.

The personal representative of an incumbent, who, for the purpose of building a glebe-house, has borrowed from the Board of First Fruits a sum equal to two years' income of his benefice, cannot recover from the succeeding incumbent as a charge on the benefice under the Ecclesiastical Building Acts (10 W. 3, c. 6; 12 G. 1, c. 10; 11 & 12 G. 3, c. 17) a further sum, amounting to two years' income, which the intestate expended pursuant to the said Acts.

Neither can he recover a sum equal to the difference between two years' income of the benefice and the balance of the loan due at the time of the induction of the succeeding incumbent.

THIS case came before the Court on the argument of a special verdict found on the trial of the case before the LORD CHIEF JUSTICE MONAHAN, at the Sittings after Michaelmas Term 1852.

The action, which was in debt, was brought by the plaintiff as the personal representative of the Rev. Thomas Carr, vicar of Aghavoe, in the Queen's County, against the defendant, as the next immediate successor, for the recovery of the sum of £1150, late currency, being the amount of an instalment of a building charge.

The special verdict found that the Rev. Thomas Carr, being vicar of the parish of Aghavoe, in the diocese of Ossory, did, on the 16th of June 1816, present a memorial in writing to the then Bishop of Ossory, for the building of a new glebe-house and offices on a new site on the glebe-land of Aghavoe, setting forth the length, breadth, height and thickness of the walls of the intended house and offices; and that the memorial was received and approved of by the Bishop, and a copy thereof returned to the said Rev. Thomas Carr. That the said Rev. Thomas Carr applied to the Trustees and Commissioners of the First Fruits in Ireland for assistance in building the said glebe-house and offices, and that the Trustees and Commissioners, in compliance with this application, advanced by way of loan to him, as vicar of the said parish, out of the funds entrusted to them, a sum of £1350, late Irish currency, to be applied for the purpose of building the said glebe-house for the said Rev. Thomas Carr and his successors, vicars of Aghavoe; the said sum of £1350 to be repaid by the Rev. Thomas Carr and his successors by annual instalments; and that the repayment was secured by the bond of the said Rev. Thomas Carr, executed by him, in the penal sum of £2700, late currency, to his then Majesty the King, and his heirs and successors, conditioned for the due repayment to the Trustees and Commissioners of the First Fruits of all the instalments of the said sum of

£1350 which should become due during his incumbency, with legal interest on the same from the time when such instalments ought to be paid; and that the said bond was duly executed by the said Thomas Carr previous to any part of the said sum of £1350 being advanced to him as aforesaid.

E. T. 1853.  
*Common Pleas.*  
 CARR  
 v.  
 HARPUR.

That the said Rev. Thomas Carr, after the memorial was approved and the bond executed, erected on a new site a new glebe-house and offices on the glebe-lands of Aghavoe, according to the particulars contained in the memorial; and that the said Bishop, on the 3rd of July 1819, issued a commission to certain commissioners to view and examine the said glebe-house and offices, and return a true and faithful account of the said building, and the sums of money expended by the said Rev. Thomas Carr in erecting same; and that the said commission was duly executed by said commissioners, and such return made by them; and that the Bishop, on the 22nd day of March 1820, made his certificate, under his hand and episcopal seal, to the following:—

“Robert, by Divine permission, Lord Bishop of Ossory, to the Trustees and Commissioners of First Fruits in Ireland, greeting:

“Whereas by certain Act of Parliament made in this kingdom in the 12th year of the reign of his Majesty King George the First, intituled ‘An Act to encourage the building of houses, and making improvements on church lands,’ to prevent dilapidations, it is among other things enacted, that it shall and may be lawful for any archbishop or bishop to grant a commission to two or more commissioners to view and examine the houses and improvements made on church lands by virtue of this Act, and to administer an oath to the commissioners so appointed, to return a true and faithful account of the said buildings and improvements, according to their best skill and knowledge; and the said commissioners shall likewise have power to examine witnesses upon oath, upon any article of account alleged to have been expended upon building the said houses and making the said improvements, as by said in part recited Act may appear. And whereas by one other Act of Parliament, made in this kingdom in the 11th and 12th years of the reign of his late Majesty George

E. T. 1853. *Common Pleas.* "the Third, entitled 'An Act for rendering more effectual the several laws for better enabling the clergy having the cure of souls to  
 CARR  
 v.  
 HARPUR. "reside upon their benefices, and to build upon their respective  
 "glebe-lands, and to prevent dilapidations, and for the encouragement of Protestant schools in the kingdom of Ireland,' it is among  
 "other things enacted, that in all cases where any archbishop, bishop, or other ecclesiastical pastor, shall from and after the  
 "passing of this Act obtain a certificate for erecting new buildings, or for making other necessary improvements on a new site within  
 "their demesne, glebe, or mensal lands, in such manner as by the said in part recited Act is directed, such archbishop, bishop, or other ecclesiastical pastor, his successors or administrator  
 "respectively, shall, from his next and immediate successor, instead of three-fourths of such sum, have and receive the full  
 "sum comprised and specified in such certificate. And whereas the said Rev. Thomas Carr, clerk, vicar of the vicarage of Aghavoe, in the Queen's County, in our said diocese, hath expended several  
 "sums of money in erecting the glebe-house and offices on the glebe-lands belonging to the said parish of Aghavoe, on a new site, pursuant to the tenor and effect of the said in part recited Act, and of the memorial, plan and estimate by him presented to and approved of by us for that purpose, and hath requested us to certify the same, in order that he may be entitled to the benefit of said last-mentioned Act of Parliament; and we, being willing to grant his petition, as of our office we are bound, did, on the 3rd day of July, in the year of our Lord 1819, direct a commission to the Rev. Marcus Monk, clerk, vicar of Rathdowny, the Rev. George Hamilton, clerk, rector and vicar of Killenogh, and the Rev. Joseph Vise, of Donoghmore, in the Queen's County, clerk, or any two of them, empowering them, amongst other things, to make inquiry into the several sums of money expended by the said Rev. Thomas Carr in and about the premises; and the said Marcus Monk and Joseph Vise, two of the commissioners aforesaid, being duly sworn on the Holy Evangelists to the due and faithful execution of the said commission, by John Roe and William O'Meagher, Esqrs., two of his Majesty's Justices of the Peace for

" the Queen's County, did take upon them the execution of the said  
 " commission, and by return made to us under their hands and  
 " seals, bearing date the 14th of February 1820, and now lodged  
 " in the registry of our said diocese, certified that they viewed and  
 " examined the said glebe-house and offices, and do find that the  
 " said house and offices are strong, lasting and durable, and are  
 " well and substantially built with stone, brick, lime and sand; and  
 " that all the timber of said house and offices, including roofs and  
 " floors, is good and sufficient foreign timber, and that the ex-  
 " tent of the said house is fifty-four feet six inches from out to  
 " out in length, fifty-four feet six inches from out to out in  
 " breadth, and the height is thirty-four feet six inches from the  
 " base to the eave-course, and the roof thereof covered with English  
 " slate; and the said house is finished and completed agreeably to  
 " the memorial, plan and estimate given in by the said Rev. Thomas  
 " Carr, and approved of by us, and that the same is fit and conve-  
 " nient for the residence and habitation of the said Rev. Thomas Carr  
 " and his successive vicars of the said parish; and that the extent  
 " of the said offices is fifty-seven feet six inches from out to out in  
 " length, and nine feet four inches from out to out in breadth, and  
 " the height ten feet; and that said offices consist of stables, court-  
 " house, barn, cow-house, &c., &c., and are finished and completed  
 " agreeably to the memorial, plan and estimate given in by the said  
 " Thomas Carr, and approved of by us, and that same are fit and  
 " convenient for the use of the said Thomas Carr and his successors,  
 " vicars of the said parish of Aghavoe; and that they examined  
 " competent persons, upon oath, respecting the vouchers of the  
 " several sums expended in building the said house and offices, and  
 " found there had been a sum of £1150 actually expended upon the  
 " same by the said Thomas Carr out of his own proper money, exclu-  
 " sive of a loan from the Board of First Fruits, of the sum of £1350.

E. T. 1853.  
*Common Pleas.*  
 CARR  
 v.  
 HARPUR.

" And the said Commissioners also certified that the said  
 " Thomas Carr had well and faithfully expended and laid out  
 " in building glebe-house and offices, and in making said improve-  
 " ments, in the whole the sum of £2500; that is to say, that he  
 " has expended a sum of £2000 in building and completing the said



E. T. 1853. "glebe-house, and a sum of £500 in building and completing said  
*Common Pleas.* "offices; and that the buildings and improvements are well worth  
 CARR "the money so laid out and expended upon them, and are all  
 v. "finished and completed agreeably to the memorial, plan and  
 HARPUR. "estimate as aforesaid. And they have also certified that on  
 "examination of John Brown and Thomas Serson, proctors or  
 "managers of the said Thomas Carr, and of John Sampson, a  
 "competent person, upon oath, that the said parish of Aghavoe is  
 "of the full clear annual value of £600 sterling.

"Now, therefore, by virtue of the power given unto us by the  
 "said Acts of Parliament, we do certify, settle and ascertain that  
 "the said Thomas Carr has really and truly expended and laid out  
 "in building and completing a glebe-house, with suitable out-offices,  
 "on a new site on the glebe-lands belonging to the said parish of  
 "Aghavoe, in our said diocese, pursuant to the memorial, plan and  
 "estimate aforesaid, given unto and approved of by us, the sum of  
 "£2500, residue thereof, in building and completing the said offices;  
 "and we do hereby certify that the said Rev. Thomas Carr has  
 "made and completed the said buildings and improvements, pur-  
 "suant to the said memorial, plan and estimate, and that the same  
 "are strong, lasting and durable, and are fit and convenient for the  
 "residence and habitation of said Rev. Thomas Carr, vicar of said  
 "parish of Aghavoe, and his successors vicars thereof; and we  
 "further certify that the said Thomas Carr has really and truly  
 "expended and laid out on and in the erecting of said buildings  
 "and improvements as aforesaid, of his own proper moneys, the  
 "sum of £1150, parcel of the said sum of £2500, and that the sum  
 "of £1350, residue of the said last-mentioned sum, was not the  
 "proper money of the said Thomas Carr, but was advanced to him  
 "as a loan by the Trustees and Commissioners of the First Fruits  
 "in Ireland, and to be repaid pursuant to the statutes in that case  
 "made and provided; and we further certify that the said vicarage  
 "of Aghavoe is of the clear yearly value and income of £600  
 "sterling, *communibus annis*. In testimony whereof we have  
 "caused our episcopal seal to be hereunto affixed this 22nd day  
 "of March 1820."

The special verdict then set out that this certificate had been duly registered, and that the Rev. Thomas Carr had died intestate on the 31st of December 1850, and that the plaintiffs were his administratrixes. It then stated that the said sum of £1350, late currency, so advanced by said Trustees and Commissioners of the First Fruits to the said Rev. Thomas Carr as a loan, exceeded two years' income of the said parish of Aghavoe, at the time of making such application to the said Commissioners, and at the time of entering into and executing the said bond, by the sum of £150 of the said currency; and that the said Rev. Thomas Carr, in his lifetime, and the plaintiffs, as such administratrixes, have paid several annual instalments of such loan, amounting in the whole to the sum of £645. 2s. 3d.; and if the said loan of £1350 was legal and binding on the successor of the said Rev. Thomas Carr, the jurors found that there was now due and owing to the said Trustees and Commissioners, in respect of the said loan of £1350, the sum of £601. 0s. 10d., and in case the said excess of £150 was not authorised or binding on the said successor, they find that there was due and owing to the said Trustees and Commissioners the sum of £462. 11s. 7d., and no more. The special verdict then found that the defendant, after the death of the Rev. Thomas Carr, was duly admitted, inducted and instituted into the vicarage of Aghavoe, and is now the vicar thereof, and the next and immediate successor of the Rev. Thomas Carr in said vicarage, and has been before the commencement of this action vicar of said parish for one year and upwards from his admission, and from the death of the Rev. Thomas Carr, and has become entitled to a year's income of the said vicarage.

The special verdict then found that if, upon the whole matter, it should seem to the Court that the plaintiffs, as such administratrixes of the Rev. Thomas Carr, are entitled to recover against the defendant as such successor, by virtue of the certificate, two years' income of such benefice, and that the defendant is indebted to the plaintiffs in the amount of the first instalment, and moiety of three fourth parts of the sum of £1107. 13s. 10½d., being two years' net income as aforesaid—it found that the defendant is

E. T. 1853:  
*Common Pleas.*

CARR  
v.  
HARPUR.

E. T. 1853.

*Common Pleas.*

CARR

v.

HARPUR.

indebted to the plaintiffs in the said sum of £415. 7s. 8½d., in manner and form, &c.; and if it should appear that the plaintiffs, as such administratrixes of the Rev. Thomas Carr, are entitled, by virtue of said certificate, to recover the sum of £1150, late currency, equivalent to the sum of £1061. 10s. 9½d. of the present currency, so advanced and expended by the Rev. Thomas Carr out of his own private moneys, irrespective of and notwithstanding the money so advanced by the said Trustees and Commissioners of First Fruits, and that the said defendant is indebted to the said plaintiffs in the sum of £898. 1s. 6½d., being a first instalment and moiety of three fourth parts of the sum of £1061. 10s. 9½d., late currency—then it found that the defendant is indebted to the plaintiffs in the said sum of £398. 1s. 6½d., in manner and form, &c.

And if the plaintiffs, as such administratrixes of the said Rev. Thomas Carr, are only entitled to recover the balance between the two years' income of said vicarage, certified as aforesaid, and the balance of the said loan still outstanding, and due to the said Trustees and Commissioners of First Fruits, and that the said loan by the said Trustees and Commissioners, of the full sum of £1350, was legal and binding on the said successors, and that said defendant is indebted to the said plaintiffs in the first instalment and moiety of three fourth parts of the sum of £506. 13s. 0½d., being the balance between the two years' income and the balance of the loan due to the Commissioners of First Fruits—it found that the defendant was indebted to the plaintiffs in the sum of £189. 14s. 10½d. And if the said plaintiffs are entitled to recover the balance between the two years' income of the said vicarage and the balance of the loan still due to the Commissioners of First Fruits, and that the excess of £150 over two years' income of the vicarage was not binding on the successor of the Rev. Thomas Carr, and that the defendant is indebted to the plaintiffs in the first instalment and moiety of three fourths of the sum of £645. 2s. 3d., being the amount of the balance of the two years' income and the balance of the loan—the jurors found the defendant to be indebted to the plaintiffs in £241. 18s. 3½d. And if the Court should consider that the plaintiffs

are entitled to recover against the defendant, as such successor, only for such instalments of the said loan as have been paid off and liquidated by the Rev. Thomas Carr in his lifetime, and the plaintiffs as his personal representatives, since his decease, and that the defendant is indebted to the plaintiffs in the first instalment and moiety of three fourth parts of the sum of £645. 2s. 3d., as paid off by the Rev. T. Carr and the plaintiffs as his personal representatives—the special verdict found that the defendant is indebted to the plaintiffs in £241. 18s. 3½d. But if it should seem to the Court, on the whole matter, that the defendant did not owe to the plaintiffs the sum of £1313. 9s. 2½d., above mentioned, then the special verdict found accordingly.

E. T. 1853.  
Common Pleas.  
CARR  
v.  
HARPUR.

In the course of the argument it was agreed that the original memorial to the bishop should stand as part of the record. The memorial ran as follows:—"To the Right Reverend Father in God, Robert, by Divine permission, Lord Bishop of Ossory.—The memorial of the Rev. Thomas Carr, clerk, vicar of Aghavoe, in the diocese of Ossory, sheweth, that there is a glebe of about one hundred and thirty-six acres in said parish, but no glebe-house; and memorialist hath lately obtained a loan of one thousand three hundred and fifty pounds from the Board of First Fruits, to enable him to build a glebe-house and offices on said glebe; that memorialist intends to erect a glebe-house on that part of the glebe called Keilagh, of stone and brick, and lime and sand, said house to be three stories high, including basement story, and to be fifty-three feet in front, by fifty-two from front to rear, out and out; and to be thirty-three feet high to the wall-place, including basement story; the outer walls of the basement story to be two feet four inches thick; the outer walls of the dining-room story to be two feet thick, and the outer walls of the bed-room story to the wall-place to be twenty-two inches thick, and to be roofed and completed with oak (bog oak excepted) or balk timber, and covered with slates. That memorialist intends to erect a range of offices at the west end of said glebe-house; the walls to be eighteen inches thick, and to contain two privies, dung, potato, turf and poultry-houses,

E. T. 1853. "and piggery, to be six feet six inches high to the wall-place,  
*Common Pleas.* "with a shed roof and duchess slating; to be forty-five feet long  
 CARR "and nine feet wide from out to out, and the walls thereof to  
 v. "be eighteen inches thick, besides inclosing kitchen and poultry  
 HARPUR. "yards and scullery, with stone walls ten feet high. That me-  
 "morialist intends to erect at the rere of the stable-yard a cow-  
 "shed for five cows, to be six feet six inches high to the wall-  
 "place, and twenty-three feet long and twelve feet six inches  
 "wide from out to out, and the walls thereof to be eighteen  
 "inches thick, with a passage to a haggard adjoining. That me-  
 "morialist intends to erect a range of offices to be lofted; the  
 "west end of the said yard to contain stable, coach-house and  
 "barn; to be fifteen feet six inches high, fifty-five feet long  
 "and eighteen feet wide from out to out, the walls thereof to  
 "be eighteen inches thick. That memorialist intends to erect  
 "the outside inclosing walls of stable-yard and offices to the north  
 "and south ends; to be eighteen inches thick, ten feet high, and  
 "that the extent of the stable-yard in the clear shall be forty-  
 "five feet by thirty-nine feet, and paved, with piers and a pair  
 "of good gates inclosing said yard at south end: that all said  
 "buildings are to be built of lime and sand and stone and brick,  
 "and to be roofed complete with oak (bog oak excepted) or balk  
 "timber, and covered with slates. That memorialist intends to  
 "begin and finish said buildings forthwith. That the yearly value  
 "of the said parish amounts on a computation to the sum of nine  
 "hundred pounds sterling, or thereabouts, and memorialist pur-  
 "poses to expend on said buildings two full years' income of said  
 "parish, and, in order to enable him to charge his successor with  
 "the payment of the same, under the provisions of the several  
 "statutes made for the encouragement of ecclesiastical buildings,  
 "prays your Lordship's allowance and approbation of this his me-  
 "morial."

"THOMAS CARR."

"Witnesses present { JOHN ATKINSON.  
 ARTHUR SAMUELS."

The memorial contained the following indorsement:—"We  
 "approve of and consent to the foregoing memorial, this 29th

"day of June, in the year of our Lord one thousand eight hundred and sixteen."

"ROBERT OSSORY."

E. T. 1853.  
*Common Pleas.*

CARR  
v.  
HARPER.

The following points were noted for argument on the part of the plaintiffs:—That the late Rev. Thomas Carr, on having expended £2307. 13s. 10½d., present currency, in building a new glebe-house in the parish of Aghavoe, of which £1061. 10s. 9½d. was advanced by himself out of his own moneys, and the remainder £1246. 9s. 1d. was a loan from the Board of First Fruits; and the said Rev. Thomas Carr, having duly obtained a certificate for said sum of £1061. 10s. 9½d., the plaintiffs, as his administratrixes, are entitled to recover from the defendant, as the next successor of said Thomas Carr, the said sum of £1061. 10s. 9½d., certified as expended by him, notwithstanding the loan from the Board of First Fruits. That the plaintiffs, if not entitled to recover said sum of £1061. 10s. 9½d., are entitled to recover the sum of £645. 2s. 3d., part of said sum of £1061. 10s. 9½d., certified as aforesaid, being the difference between the aforesaid loan still due to the Board of First Fruits, and the two years' income of the benefice. That in case the plaintiffs are not entitled to recover the moneys advanced by said Thomas Carr, yet they are entitled to recover from the defendant the several instalments of the loan advanced by the Board of First Fruits, which was paid by said Thomas Carr during his incumbency.

*W. D. Ferguson* (with whom were *Napier* and *Hickey*), for the plaintiffs.

The plaintiffs are either entitled to the full sum of £1150, or at least to the difference between the two years' income and the balance of the loan still due to the Board of First Fruits. With regard to the first view of the plaintiff's rights, it will be admitted that if there had been no loan from the Board of First Fruits, the plaintiff would have been entitled to recover the full sum certified to have been advanced by the plaintiff out of his own funds, and that under the 43 G. 3, c. 106, re-payment of the loan from the Board would have fallen upon the incumbent, if he had lived for a period of seventeen years after having obtained the loan. Under the

**E. T. 1853.**  
*Common Pleas.*

**CARE**  
**v.**  
**HARPUR.**

earliest of the Acts\* which form the building code, the incumbent who built was entitled to recover two-thirds of the sum expended from his immediate successor, who, in his turn, was entitled to one-half of that sum, or one-third of the sum originally expended, from his successor; the expense was, therefore, under this Act equally divided between three successive incumbents; but there was no limit to the sum to be expended. The statute 12 G. 1, c. 10, after reciting the inconveniences which had arisen from the previous Act, in livings being over-burthened with larger sums than they were able to bear, enacts, that the certificates to be given by virtue of the statute of *William* should contain an account of the clear yearly value of the benefice; and directs that the first incumbent should recover three fourths instead of two thirds of the sum certified to be expended; and by the 3rd section, no successor can be made liable to pay more than one and a-half year's income. By that Act, therefore, the expense of building was equally divided between four successive incumbents. By the 11 & 12 G. 3, c. 17, s. 3, the incumbent building is entitled to recover the whole sum certified; and by section 4, that sum is distributable amongst four successive incumbents, as under the previous Act. By the 43 G. 3, c. 106, the Board of First Fruits were enabled to advance by way of loan any sum of money not exceeding two years' income, for the purpose of building glebe-houses, &c., which loans were to be repaid by annual instalments. The 5th section makes the sums advanced a charge on the benefice; and the 7th section enacts, that the sums so advanced shall be distinguished and mentioned apart in the usual certificate to be given by any archbishop or bishop, by virtue of the Acts in force to enable an incumbent to recover against his successor any and every sum or sums by any incumbent, laid out or expended out of his own proper income, on the building of such glebe-houses and offices, which would otherwise be allowed by the said certificate; and a separate and distinct portion of the said certificate shall be allotted by such archbishop or bishop for ascertaining the expenditure of the sum so lent and advanced by the said trustees. The meaning of this provision obviously is, that where the expenditure is

\* 10 W. 3, c. 6.

made up of a mixed fund, consisting partly of a loan from the Board of First Fruits, and partly of a sum advanced by the incumbent out of his own resources, the sum advanced by the Board is to be stated separately, so that the incumbent may not obtain as against his successor the benefit of an advance which is not out of his own money. The bishop is bound to certify for the entire sum; a provision which would be useless if the incumbent could never recover the sum advanced by himself, in cases where the loan from the Board amounted to two years' income. The charge is not created by the certificate of the bishop; the money becomes a charge the moment it is advanced, and the bond makes the incumbent personally liable to the re-payment of it.

E. T. 1853.  
*Common Pleas.*

CARE  
v.  
HARPUR.

*Hayes and Radcliffe*, for the defendant.

The question must now be considered as if it had arisen at the end of six months from the date of the loan by the Board. The policy of the earlier part of the code was, that no more than two years' income should be recoverable. The preamble of the 43 G. 3, c. 106, shows that, at the time it was passed, the clergy were supposed to be in want of money. An incumbent, when about to build, might be supplied with means of his own, in which case he was provided for by the previous statutes, or he might be obliged to borrow the entire sum required from the Board, or he might be partially provided with means of his own, and at the same time be obliged to seek assistance from the Board of First Fruits. The latter case is provided for by the 7th section; and it was with a view to a case of this nature that the bishop, in giving the certificate, is directed to discriminate between the two sources from which the requisite funds have been supplied. If glebe-houses were built altogether by a loan, no certificate would be required; and by section 8, the safeguards against improvident expenditures, which were previously entrusted to the bishop, are vested in the Board of First Fruits. The only two cases reported, *Stubber v. Trench* (a) and *Graves v. Murray* (b), show the general impression, that only two years' income could

(a) 1 H. & B. 140.  
VOL. 3.

(b) H. & J. 165.  
35 L



E. T. 1853. in any event be made chargeable as against the successor. The  
*Common Pleas.* case of *Stubber v. Trench* is identical with the present; and al-  
 CAER though there was no decision there upon the question involved in  
 v. the present case, yet it appears that the bishop acted in that  
 HARPUR. case in accordance with the view of the law contended for on  
 behalf of the defendant. It could never have been intended  
 that an incumbent, who had in his hands two years' income,  
 should be at liberty to borrow from the Board a further sum,  
 equal to two years' income. The effect of such a construction  
 would be, while increasing the charge as against the successor, to  
 diminish the income which was to pay that charge, and to incumber  
 the successor with a glebe-house of a description unsuited to his  
 means. The 11 & 12 G. 3, c. 17, and 31 G. 3, c. 19, s. 2, were  
 also referred to.

*Napier*, in reply.

The argument on the other side must be pushed to this:—that if  
 the incumbent who has borrowed from the Board of First Fruits  
 has repaid all the instalments due to them before his death, he  
 yet cannot recover from his successor any portion of his own  
 money which he may have expended in addition. Such a con-  
 struction would be highly inequitable.—[MONAHAN, C. J. The  
 incumbent who borrows from the Board does not pay interest  
 on the loan, while the incumbent who expends his own money  
 forfeits the interest in the meantime.]—The statute 10 W. 3, c. 6,  
 gave a right to recover a certain portion of the whole sum ex-  
 pended, without any reference to the value of the benefice. In  
 the present case the memorial states the loan from the Board of  
 First Fruits, the supposed annual value of the benefice, and the  
 dimensions of the intended building; and that the incumbent  
 proposes to expend for that purpose two full years' income of the  
 benefice; “and in order to enable him to charge his successor  
 “with payment of the same, under the provisions of the several  
 “statutes made for the encouragement of ecclesiastical buildings,  
 “prays,” &c. This shows that it was intended to charge the  
 successor with the payment of the two years' income advanced

by the incumbent, independent of the loan from the Board.—  
 [MONAHAN, C. J. I have no doubt that, if we saw the estimate  
 sent to the Board of First Fruits, we should see that it was pro-  
 posed to build a house for £1800, that is, for the supposed two  
 years' income of the benefice. The bishop's certificate was given  
 long afterwards, when the work was done. According to your  
 construction, the estimate should have been for £1350, the amount  
 of the loan from the Board, and £1800, the amount of two  
 years' income of the benefice.]—He meant that for whatever sum  
 was advanced beyond the loan, he would have a valid claim on  
 his successor, to the amount of two years' income. Suppose the  
 incumbent to pay several instalments of the loan to the Board  
 of First Fruits; in that case, according to the construction con-  
 tended for by the defendant, the succeeding incumbent would never  
 have to pay two years' income; whereas it was plainly the inten-  
 tion of the Legislature that where more than two years' income  
 was expended, two years' income should be recoverable as against  
 the successor.—[TORRENS, J. The general policy of these Acts  
 was to protect the successor, without injuring the present incum-  
 bent; and it appears to me that if the incumbent lived for seven-  
 teen years, and so paid off all the instalments to the Board, the  
 enjoyment for seventeen years would be a recompense to him for  
 his money.—MONAHAN, C. J. Besides, if he had expended his  
 own money, he would have been diminishing his income by the  
 interest of the moneys.]—But if not entitled to recover the full  
 sum advanced, the plaintiffs are entitled to recover two years'  
 income, less by the amount of the instalments which the successor  
 was bound to pay to the Board of First Fruits. On that con-  
 struction, the successor would not have in any event to pay  
 more than two years' income of the benefice.

E. T. 1853.  
*Common Pleas.*  
 CARR  
 v.  
 HARPUR.

*Cur. ad. vult.*

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MONAHAN, C. J.

This case comes before the Court on a special verdict, and the  
 facts, as stated upon the special verdict, are as follow:—It was  
 an action brought by the administratrixes of the late Rev. Thomas

May 6.

E. T. 1853.  
*Common Pleas.*

CARR  
v.  
HARPUR.

Carr, incumbent of the parish of Aghavoe, against his successor the Rev. Singleton Harpur, to recover an instalment of a building charge. It appears that in the year 1816, the Rev. Thomas Carr, being at the time the incumbent of Aghavoe, presented a memorial to the bishop, in which he stated that there was attached to the living a glebe of 130 acres, that he intended building upon it a residence suitable to the living, and that for that purpose he had obtained a loan of £1350 from the Board of First Fruits. He also stated in the memorial that the supposed annual value of the living was £900 sterling; that he intended to expend two years' income in building; and that in order to be able to charge his successor under the statute, he sought the bishop's approbation and certificate. There was some discussion on the argument before the Court as to the meaning of this memorial. However, we are of opinion that the substance of it is, that the incumbent intended to expend £1800, of which sum he had borrowed £1350 from the Board of First Fruits, and intended to expend £450 of his own money. It then appears that after the building was completed, he presented a memorial to the bishop, and obtained a commission for the purpose of ascertaining what sum he had expended; and the commissioners reported, and the bishop certified, that Mr. Carr had built a house pursuant to the said memorial, and that he had expended £2500, being £600 or £700 more than the sum of £1800, which we think is the sum stated by the memorial as intended to be expended; but we think it is apparent, even from this certificate, that the construction of the memorial we have adopted is the correct one, and that it was not intended to express thereby that £1800 was to be expended in addition to the sum borrowed from the Board of First Fruits. It appears from the certificate that the two years' income of the living was less than it had been represented; because, although it was stated in the original memorial that £900 was the annual income, and therefore £1800 the amount of two years' income, it now turns out that the annual income was £600; so that, instead of having borrowed from the Board of First Fruits £500 less than two years' income, the loan in fact exceeded two years' income. It appears that Mr.

Carr died in the year 1850, and that there has been repaid to the Board of First Fruits, either by himself or his administratrixes, the sum of £645 out of £1350 borrowed, leaving a balance of £705 still due to the Board. The question then for our decision is this—whether the incumbent, having borrowed fully two years' income from the Board of First Fruits, and having, besides, expended £1150, can recover the whole of the sum advanced by himself, that sum not exceeding two years' income? It has been urged, that if he is not entitled to recover the entire sum, that he is, at least, entitled to recover a sum equal to the difference between two years' income and the balance of the loan still due to the Board. The case was argued principally on the construction of the various Acts of Parliament on the subject; and the plaintiff contended that the incumbent was entitled to recover two years' income from his successor, and at the same time to leave the living charged with the balance of the loan due to the Board of First Fruits. The question in this case is—is that construction right? The first Act on the subject is the 10 W. 3, c. 6. By that Act it was enacted generally, that any ecclesiastical persons building or making necessary improvements on demesne, glebe or mensal lands, &c., shall have from the next successor two-thirds of the sum expended on such buildings, additions and improvements. Under that Act, it is obvious that the party might have exercised his discretion as to the sum to be expended, and the description of the house, and that a sum might have been expended, and a house built quite unsuited to the income of the living. Accordingly that Act, having been found productive of a great deal of mischief, was amended by the 12 G. 1, c. 10, which in its first section recites the previous Act, and the mischief caused thereby, and that several livings had been overburdened with larger sums than they were able to bear; that the successors had been incumbered with the claims for the building of houses, even though the houses were built in some instances with a larger sum than, having regard to the income of the living, ought to be charged upon it, and that the houses were of such bad materials as to be of little use to the successors in those livings. It then enacts, that for the future all certificates for improvements shall contain

E. T. 1853.  
*Common Pleas.*

CARR  
v.  
HARPUR.

E. T. 1853.  
*Common Pleas.*

CARR  
v.

HARFUR.

an account of the clear yearly value of the living. Then the second section enacts that instead of two-thirds, the incumbent shall recover three-fourths from his successor, who shall recover one-half the sum originally certified from his immediate successor, who shall recover one-fourth of the original sum from his immediate successor. And it is provided in terms that no successor shall be obliged to pay more than a year and a-half's income. So that if the incumbent wished to recover the full proportion of his expenditure, he could only expend two years' income at the most. The seventh section enacts that the incumbent shall, before getting a certificate, submit to the bishop a writing setting forth the length, breadth, height and thickness of the walls of such house or houses as he intends to build, with the number of stories in them or each of them to be contained, together with the situation of the ground on which the same are to stand, and also the nature and extent of all other improvements which he so intends to make; and then it proceeds to say that if the said house, houses or improvements, or so much of the same as shall be built or made before the death or removal of the respective incumbents undertaking the same, shall be found agreeable unto what is contained in such writing, and the value thereof so reported by commissioners appointed for that purpose, then, and not otherwise, such certificate as is above mentioned shall be given for the same, according to the value of such house or houses and improvements so reported, and under the limitations of the Act. This is a very complicated section, and one in which it is difficult to understand the meaning of the Legislature; but though I do not mean to make it the foundation of my judgment, still the section appears to me to show that it was contemplated, as might be expected, that when the memorial submitted a plan of the proposed building, it was also intended to submit the sum proposed to be expended on the building: and in this view, it seems to me, I am borne out by the 1st section of 17 G. 2, c. 8, which—after reciting that considerable difficulty had arisen in specifying beforehand the intended repairs of old houses, and that from an apprehension that the 12 G. 1, c. 10, extended only to new buildings, or other new improvements intended to be made, several

old and ruinous houses had been repaired without giving any such specification, and that a doubt had arisen whether in such a case the incumbent would be entitled to be paid the sum of money to which he would have been entitled if such account in writing had been given in—enacts, that the bishop may grant a commission to two or more persons to view and examine any old or ruinous houses, out-houses or buildings on glebe-lands, and to return a faithful estimate of such repairs; and that on such return, the bishop may grant a certificate according to the value reported by such commissioners, or for any lesser sum, although no such account in writing as was required by the 12 G. 1, c. 10, had been given in; and then, at the end of the same section, it expressly enacts, that for the future an account in the general of the house or out-houses, or other buildings, and the several parts thereof intended to be repaired, and of the sum intended to be laid out in such repairs, shall be delivered in to the person or persons empowered to grant such certificate, one fortnight before such repairs are begun. And it appears in the present case the memorial did mention the sum which the incumbent proposed to expend. The next statute on the subject is the 11 & 12 G. 3, c. 17, the 3rd section of which enacts, that the incumbent shall, from his next and immediate successor, instead of three-fourths of such charge, have and receive the full sum comprised and specified in such certificate, provided always that such sum shall not exceed the clear value of two years' income; and by the 4th section the immediate successor, having paid the entire sum so certified, was entitled to receive three-fourths of that sum from his next successor, who was entitled to receive one-half the sum originally certified from his next successor, who was entitled to receive one-fourth of the original sum from his next successor. Under this Act, therefore, the builder would be entitled to recover from his successor the entire sum he had expended, provided that sum did not exceed two years' income of the benefice. I do not mean to lay down that if, on the whole certificate, we are able to see that two years' income has been expended, that the certificate is invalid on account of a larger sum having been expended; but it appears to me, particularly having

E. T. 1853.  
*Common Pleas.*

CARR  
v.  
HARPER.

E. T. 1853. regard to the 3rd section of the 11 & 12 G. 3, c. 17, that the Legis-  
*Common Pleas.* lature intended that two years' income was to be the entire sum  
 stated in the certificate; and there can be no manner of doubt that,  
 CARE whether it was or not, two years' income only could have been  
 v. recovered. That being the state of the law at the time of the  
 HARPUR. passing of the 43 G. 3, c. 106 (the First Fruits Act), the whole  
 question in this case is, what is the true construction of that  
 Act? The 1st section, after reciting that in many parts of Ire-  
 land there were no glebe-houses fit or convenient for the residence  
 of the incumbent, enacts, "that the Commissioners of First Fruits  
 "in Ireland may advance by way of loan, out of the funds en-  
 "trusted to their care, to any incumbent who shall apply, a sum  
 "of money not exceeding two years' income of the benefice, such  
 "money to be applied in purchasing or building glebe-houses,  
 "and making other improvements, and to be repaid by certain  
 "instalments, with or without interest." From the preamble of  
 this section, it appears to me that the object of that Act was to  
 enable incumbents in small parishes to get the loan of money  
 free of interest; but although that was one of the objects of the  
 Act, still it was not imperative on the Board of First Fruits to  
 do so; for in a subsequent section it is enacted that the Com-  
 missioners may charge interest if they please so to do; but where  
 they choose to lend the money free of interest, then it is to be  
 repaid by annual instalments of £6 per cent., and thus it would  
 all be paid off in seventeen years. The question then for our  
 consideration in this case is, whether, according to the true con-  
 struction of that Act, an incumbent of a benefice can borrow two  
 years' income from the Board of First Fruits, and also at the  
 same time expend two years' income of his own money; so that  
 if he died within a short time afterwards, the living would be  
 burthened with four years' income when it reached his successor.  
 If that be the true construction of these Acts, then of course, no  
 matter how hard it might be upon successors, in such case we  
 should be obliged to give them that construction; but before we  
 do so, I confess, in my opinion, there should be some very clear and  
 direct legislation on the subject. No distinction appears to have

been made in this Act between the amount of the money borrowed at interest and the money borrowed as a charge on the living. That section applies to each; that section provides, that every sum of money advanced to any incumbent, by virtue of that Act, shall be distinguished and mentioned apart in the usual certificate from every sum expended by the incumbent out of his own proper income, on the building of such glebe-house and offices, which would otherwise be allowed by the said certificate; and a separate and distinct portion of the said certificate shall be allotted by such archbishop or bishop, for the ascertaining the expenditure of the sum so lent and advanced by the said trustees. Now, what is the meaning of saying that this money is to be set apart and distinguished from the sum which would otherwise be allowed by the certificate? If no sum of money had been advanced by the Board, then what sum of money would have been allowed by the certificate—two years' income? It appears to me, therefore, that as the sum advanced by the Board of First Fruits is to be mentioned apart, that means that it is to be deducted from the sum which the certificate would otherwise render chargeable on the successor, and therefore must be deducted from the two years' income; and that in the present case the incumbent, having borrowed from the Board of First Fruits the entire sum which he was entitled to expend, so as to charge his successor, has no right to charge his successor with what he has advanced out of his own money besides. The whole policy of the code seems to be, that in no case should there be more than two years' income expended in building, so as to make it chargeable in any way on the successor. On the whole, therefore, we are of opinion there must be judgment for the defendant, as the sum borrowed from the Board of First Fruits exceeded two years' income of the benefice.

E. T. 1853.  
*Common Pleas.*  
 CARR  
 v.  
 HARPUR.

TORRENS, J.

I quite concur in all that has fallen from my LORD CHIEF JUSTICE. It appears to be quite manifest, as the construction of all these statutes, that their general policy was to relieve incumbents



E. T. 1853.  
*Common Pleas.*

CARR  
v.

HARPUR.

to a certain extent; and it appears to me to be immaterial whether the charge was created by his own personal expenditure in building the glebe-house, or by his having borrowed money from the Board of First Fruits for that purpose. The object of the code was that in either case the incumbent should not be liable to more than two years' income of the benefice. And I can hardly conceive that the Legislature can have contemplated such an absurdity as to enable the incumbent first to charge the living with two years' income, on account of advances made out of his own funds, and afterwards to charge the benefice with a further sum, amounting to two years' income, by way of loan from the Board of First Fruits.

BALL, J.

I wish merely to notice one portion of the judgment of the LORD CHIEF JUSTICE, which relates to the proper construction of the 7th section of the 12 G. 1, c. 10. My LORD CHIEF JUSTICE seems to be of opinion that the sum proposed to be expended, as well as the dimensions of the house intended to be erected, should be mentioned in the memorial. I do not think that the consideration of that question is necessary to the determination of the question now before us; but I must say I feel great difficulty in adopting the construction of that section which has been suggested by the LORD CHIEF JUSTICE. If we were legislating on the subject, probably it would be found advisable to oblige the incumbent who proposes to mention in his memorial the sum which he proposes to expend; but as it comes before us, the question is, what did the Legislature intend to express? Now I cannot find in the section any terms importing such a meaning, unless it be implied under the terms, nature and extent of all other improvements, which I do not think it is. The 7th section provides, that if the house, &c., shall be found agreeable to what was contained in the writing sent in by the incumbent, and to the value reported by the Commissioners, then the certificate shall be granted, referring to the 9th section, which was to follow, and by which directions are given as to how the Commissioners are to be appointed. It appears to me, therefore, to be reasonable to hold, that instead of its being necessary that the

value should be set out in the memorial, that it is only necessary that it should set out the dimensions, &c., leaving the value to be specified by the Commissioners' report. But as I have before remarked, I do not think it is necessary for the decision of this case to discuss that question, as I think we ought not, without some very clear legislation on the subject, hold that the Legislature, which had been all along guarding the successor from being liable to the payment of a building charge exceeding two years' income, would by mere implication convert that liability into a liability to pay four years' income. I therefore fully concur in the decision of the Court.

E. T. 1853.  
*Common Pleas.*

CARR  
v.  
HARPUR.

JACKSON, J., concurred.

Judgment for the defendant.

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T. T. 1852.  
*Exch. Cham.*

**Exchequer Chamber.**

**THE GOVERNOR AND COMPANY OF THE BANK OF  
 IRELAND**

v.

**TRUSTEES OF THE CHARITIES OF JOSEPH EVANS.\***

June 9, 23,  
 24.

(Error from the Court of Queen's Bench.)

Case, by a TRESPASS on the case, brought by the Trustees of the Charities of corporation, as proprietors Joseph Evans (deceased) against the Governor and Company of the of Government stock, against Bank of Ireland.  
 the Bank of

Ireland, for refusing to transfer this stock, and for permitting it to be transferred without their authority. The stock had been transferred under forged letters of attorney, purporting to be under the common seal of the corporation, which their agent had affixed to the letters of attorney without their knowledge or consent, and for which he had been prosecuted by the corporation, and convicted.

The Judge told the jury, if they believed the evidence, the letters of attorney were forgeries, and that believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclusively by the neglect or default of the plaintiffs; and that in considering whether the use so made of the common seal was the exclusive cause of the imposition and fraud practised on the defendants, they should consider whether there was any neglect or default on the part of the defendants in examining the letters of attorney, or inquiring into their genuineness; and if they were of opinion that there was such neglect or default, and that same in any degree contributed to said imposition and fraud, they should find for the plaintiffs. The plaintiffs excepted to this charge, and required the Judge to tell the jury that the documents being forgeries, they should find for the plaintiffs, notwithstanding the allegation of default or neglect by the plaintiffs; and also to direct the jury, that if they believed on the evidence that the plaintiffs did not previously authorise, and were not privy to, the affixing of the seal to the letters of attorney, and did not, by any subsequent act, adopt them, they should find for the plaintiffs.

*Held*, on error from the Court below, allowing the exceptions, that the charge of the Judge was wrong, and that the exceptions were properly allowed. (*Dissentiente PRIGOT, C. B.*)

Upon a bill of exceptions taken by the plaintiffs to the charge of the Judge, the Court below awarded a *venire de novo*, upon which a verdict was had for the plaintiffs, the defendants not appearing, and judgment was entered thereon. The defendants brought a writ of error on this judgment. The transcript of the record returned into this Court by the Court below omitted the proceedings on the first trial, the bill of exceptions and judgment thereon by the Court below, merely entering continuances of *vice comes non misit breve* from the award of the first *venire* to the entry of the verdict on the second trial. The plaintiffs in error alleged diminution, and this Court held they were entitled to have those matters returned as part of the record.

*Held*, that the statute 28 G. 3, c. 31, having incorporated the exceptions into the *postea*, thereby made them part of the record, and that this Court was bound to consider them. (*Dissentientibus CRAMPTON, J., and PERRIN, J.*)

*Kennedy v. Gregg* (10 Ir. Law Rep. 559) commented on and doubted.

\* *Absentibus* RICHARDS, B., MOORE and GREENE, J.J.

The declaration contained seven counts. The first count stated that the plaintiffs, being proprietors of £9300, £3½ per cent. Government stock standing in their names in the books of the defendants, called on the defendants to permit such sum to be transferred to the name of their appointee; and alleged as a breach, that the defendants refused to enter such transfer.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

The second count was to the same effect.

The third and fourth counts charged the defendants with permitting the plaintiffs' stock to be transferred without any legal authority from them; and the other counts were for refusing to pay the dividends on the stock.

Plea—The general issue.

On the trial, before BLACKBURN, C. J., at the Sittings after Michaelmas Term 1847, the plaintiffs gave in evidence the Act of Parliament incorporating them as trustees, and a consent admitting several formal matters, amongst others, the judgment of conviction of one William Grace, at the prosecution of the plaintiffs, for forgery of five letters of attorney purporting to be the deeds of the plaintiffs, authorising the transfer of the stock mentioned in the declaration; that the books in the Bank had entries of stock to the credit of the plaintiffs; also a letter of attorney, dated the 27th of February 1847, to Alexander Colles, to transfer the stock, under the corporate seal of the plaintiffs, and duly executed by them; the demand by Alexander Colles to transfer the stock, and the refusal of the defendants so to do; that there was on the 15th of December 1838 stock in Bank to the credit of the plaintiffs, amount £4566. 16s. 8d., old £3½ per centum stock, and £4733. 8s. 8d., new £3½ per centum stock. The consent also admitted a letter of attorney, bearing date the 4th of

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NOTE.—37 G. 3, c. 54, s. 6, enacts "That it shall and may be lawful for the Governor and the Company of the Bank of Ireland to authorise and direct such persons as aforesaid to keep books wherein all assignments or transfers of the said principal sums or stock shall be entered or registered, in such manner as the said Company shall direct, and every such entry shall be signed by the person or persons making such assignment or transfer; or if such person or persons be absent, by his, her or their respective attorney or attorneys thereunto lawfully authorised in writing, under his, her or their hand and seal, or hands and seals, to be attested by two or more credible witnesses."

T. T. 1852. June 1836, from the plaintiffs to William Grace, authorising him to receive the dividends on this stock. This letter bore the common seal of the corporation, and was attested in this form :—

*Esch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

"Signed, sealed and delivered in the presence of us, by  
PARR KINGSMILL,  
Mayor of Kilkenny,  
JOSEPH BOURKE, Dean of Ossory,  
of the City of Kilkenny."

} L. S.

At the foot of this power was written the following words :—

"I demand to act by this letter of attorney.—Witness my hand  
this 25th of June 1836. "WILLIAM GRACE,"  
"Witness—J. ANDERSON."

And the plaintiffs further produced as a witness Charles Vignoles, who proved the name of Joseph Bourke, subscribed to the power of attorney of 4th of June 1836, to be in the handwriting of Joseph Bourke, late Dean of Ossory, and one of the trustees of the corporation. That he was appointed Dean of Ossory in May 1843, and as such was an *ex officio* trustee of the corporation; he did not at any time as such trustee authorise the sale or transfer of any portion of Government stock lodged in the Bank of Ireland, in the name and to the credit of the trustees aforesaid; nor did he during the period he was trustee ever know, up to a certain period, namely on or about the 10th of October 1846, any thing take place as to the sale or transfer of said stock, when he heard rumours in reference to it; he knew Grace, that he was agent to the trustees and corporation. After he commenced to act as trustee, he attended all the meetings of the board, and was always in the chair at such meetings, and during that time not any of the board authorised Grace to affix the corporate seal to any document. He was then handed a book, and proved that the entries therein were the accounts of Grace, and in his handwriting; the book was a corporate book of the trustees. He also proved that the entries in this book were signed by him as chairman of the board; by the entries the corporation were credited with the full receipt of the dividends on said Government stock, up to the very last settlement of accounts that he attended, as if paid by the Bank. He also proved that at the time when these credits were given by Grace to the trustees, he had not the slightest

knowledge that the stock had been transferred or sold out. The entries were audited and signed by him as chairman. He also proved that Robert Butler, late one of the trustees, used to attend the meetings; he was dead. Joseph Hackett, late mayor of the city of Kilkenny, during the time he held that office, used always to attend such meetings, also the Rev. Wilberforce Caulfield attended; they were the principal persons who used to attend the meetings. On or about the 10th of October 1846, he first learned that the stock had been sold; he had heard rumours of it before that period, and on that occasion he made inquiries in reference to the transfer of the stock, and since understood that the stock was removed; and, very shortly after that period, he saw Grace in custody. He was examined at the trial of Grace, who was prosecuted at the expense of the trustees.

On his cross-examination he deposed he became Dean of Ossory in 1843, and had known Grace since that time. Grace acted as agent for the corporation a considerable time previous to his being appointed Dean of Ossory, and he believed it was from 1836. Denroche was Grace's predecessor; was not acquainted with Denroche, and could not say why Denroche ceased to be agent to the corporation; he did not know it of his own knowledge, but might have heard it from the trustees, that there was a mal-administration of the property by Denroche. He did not hear when that took place; but he was removed for that cause. The trustees certainly reposed a good deal of confidence in Grace; he did, and so far as he knew, the other members did also. According to his conception, Grace was perfectly respectable. Witness was then handed, by Counsel for the defendants, a document purporting to be a power of attorney, bearing date the 22nd day of November 1842, and purporting to be made by the plaintiffs, whereby Robert Corbet was appointed their attorney for the transfer of £3000 of old £3½ per cent. Government stock. He deposed that he believed the seal affixed to it to be an impression of the corporate seal, from the resemblance; he thought he should act upon it, and would do so, if authenticated; he had no doubt that signature was the handwriting of Grace. He then gave similar evidence as to four other letters of attorney, dated respec-

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

tively 16th of January 1843, 15th of June 1843, 17th of November 1843, and 10th of June 1845. He further deposed, that the rumours had reached him some time in the year 1846; he then made inquiry as to the stock, and got a person to make inquiry at the Bank, just previous to Grace's arrest; and the very morning he received intelligence of the same being abstracted, he took immediate proceedings against Grace. That was not the first time his attention was called to Grace's conduct generally, as on a former occasion he was warned concerning him, in a conversation, and what he heard led him to inquire whether the moneys had ever been placed in the Bank to the credit of the trustees, and having heard that it had been so placed, he was satisfied that it remained there; that might have been one year and a-half previous; he thought it was when Mr. Smithwick was mayor he said something to him in reference to Grace; there was a discussion about it; the only difference was, as to whether there should be a publication of the accounts of the trustees; but had no recollection that it had any reference as to the propriety of Grace's conduct. Doctor Kane succeeded Smithwick; did not recollect Kane reviving the matter, but recollected a proposition made by him that the accounts should be published every year, and that it was objected to; there was no special distrust of Grace; but there was an expression of doubt as to whether the money had been lodged by Grace, and documents were then produced by Grace, which he considered to be satisfactory as to the lodgment; that occurred about two years after he became Dean. There was a seal in Grace's custody; it was the corporate seal. He had no doubt that Grace had it all the time since he became trustee; that Grace found it in his room, and handed it to him in October 1846. He had no recollection of seeing it from the time he became trustee until Grace handed it in October 1846. A lease was executed by the corporation since he became trustee, and the seal was affixed to that lease by him. Instructions were given by the board to Grace to prepare that lease; any documents perfected under the sanction of the seal were done by him as chairman; whenever he affixed the seal, he also affixed his name, but he never was present when Grace affixed

the seal to any instrument. He affixed the seal with his own hand in that particular instance, and gave it back to Grace. Grace prepared the instrument, so far as filling it up. He would not undertake to say it was brought to him with the seal affixed; the lease was made to a person of the name of Shearman. Shearman came to the board to make a complaint. Shearman had been a tenant to the trustees before the execution of the lease—not Shearman who made the complaint, but his uncle, was tenant when witness became a member of the board; the complaint was some difference as to the accounts between the trustees and Shearman; it was as to the accuracy of the accounts kept by Grace. Grace was charged with not having credited Shearman with money he had paid; could not say who was present at the time. At a subsequent investigation, he satisfied his own mind that that charge was incorrect, and thought Shearman was also satisfied.

On re-examination, he deposed that his confidence in Grace was rather confirmed by the complaints; for he conceived he was wronged, as instruments shown to him convinced him that the money was in the Bank. He was under the conviction no act done by Grace was valid, and he remained under that conviction up to the present moment. He was satisfied it was utterly impossible the fund could be touched without the signature of a member of the corporation.

Joseph Hackett stated that he was an *ex officio* trustee of the corporation, as mayor of Kilkenny, in the year 1846, and continued so for one year. He did not during that year give any authority whatever to any person to transfer the stock of the trustees; he knew at the latter end of the year that the stock had been transferred, by making an application to the Bank about August or September, and in October he told it to the Dean. He was induced to make the application by rumours that the stock had been transferred. Smithwick told him he suspected it had been transferred.

James Burnham deposed, that he understood he was trustee during his year of office as mayor. He was sworn into office as mayor in September 1842, and continued in office until 5th of September 1843, and during that time he never executed any power of attor-

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

ney for the sale of stock belonging to the trustees, by affixing the corporate seal, or in any other way, and did not authorise any person to do so. On cross-examination, he stated that he attended one meeting; that it was the practice of the board to summon the members of the board; that none of the details came under his notice. He never saw the seal during his mayoralty; it was never produced to the meeting. The Dean showed it to him about a year since; he never saw it before.

The plaintiffs having closed their case, the following evidence was given on behalf of defendants.

Robert Corbet stated that he was a stock-broker; and the aforesaid five several documents, purporting to be powers of attorney, and dated 22nd of November 1842, 16th of January 1843, 15th of June 1843, 17th of November 1843, 10th of June 1845, having been produced to him, he stated he had seen those powers of attorney before; they had been in his possession; he got them first from the Bank unexecuted, and then sent them to Grace, and received them back from him in their present state. He then brought them to the Bank, and was permitted to transfer the stock the day after that the powers were respectively lodged with the Bank in each case, and he transferred the stock; and in each case he received the produce and remitted them by an order on the Provincial Bank, in due course, in favour of Grace. He had known Grace before, and had known him to be agent for the plaintiffs; Grace's signature was to each of those documents.

On cross-examination, he stated that in each case the powers were lodged with the Bank on the day before they were acted on; that was the invariable course in the Bank; that in each case the Bank allowed the transfer to be made on the following day. He had no communication with any person but Grace; but when he came to make the transfer on the following day, he was at once permitted so to do.

Joseph Anderson deposed he held a situation in the transfer department of the Bank of Ireland, and was in that situation in the years 1842 and 1843; it was his duty to examine powers of attorney presented for the purpose of authorising a transfer. He inspec-

ted those powers; he had acted occasionally on the seal of the corporation, and examined the documents before he acted on them; they were left with him the ordinary time. The five documents, purporting to be powers of attorney, having been handed to witness, he stated that he acted on them, and allowed the transfers.

On cross-examination, he deposed the power to receive the interest was first lodged with him; he was not then acquainted with the seal; he knew the five others from comparison with the first. The first time it was presented to him, he might not know the exact stamp. He knew Grace's respectability; could not say what he did on the first occasion; could not remember the fact of that power being presented to him; could not positively say he acted on Grace's respectability. He always looked at the seal, and compared it with the original seal, and that, to the best of his belief, he did so in the present case; it was witness's general practice. In 1845, to the best of his belief, he looked at the seal, and compared it; and from Grace's respectability, and being acquainted with the charities, he acted on it. He had confidence in Grace; he did not compare the seal affixed in 1845 with the dividend power of 1836; he made the usual inquiry, comparing the seal with the seal last produced. One of the jurors examined witness as follows:—"You say at first you did not know the seal to the dividend power, but subsequently there was nothing to excite your suspicion in the transaction, as to its being perfectly legal and correct;" and witness replied, "certainly."

Henry Bibby deposed that he was a Master Extraordinary of the Court of Chancery, and was so in November 1842; and to the documents purporting to be powers of attorney, bearing date respectively 22nd of November 1842, 17th of November 1843, and 10th of June 1845, his name was subscribed respectively as a witness.

On cross-examination, he deposed and proved that upon the occasion he signed the document, purporting to be power of attorney of 22nd of November 1842, he did not see James Burnham affix the seal thereto, and that he had no recollection that James Burnham was present on that occasion; and to the best of his recollection at this remote period, no person was present but Grace himself. He

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

saw Grace apply the seal to the wax, otherwise he would not have witnessed the instrument; he was not aware of what he attested, namely that James Burnham affixed the seal; he was not aware of any such thing, and knew nothing about it. The same observations and evidence applied to all the documents. He depended on the character of Grace; he did not know that Grace was at that time acting as agent of the trustees.

James Edmonds and Abraham Denroche gave similar evidence.

Edward Smithwick deposed that he was mayor before Mr. Hackett, and commenced his mayoralty in the winter of 1843; he attended only one meeting during his time. About the latter part of the month of October, he recollected having called for an account of the receipts of the funds, and on that occasion he observed a receipt for interest on £9000; he called the Dean aside, and told him he thought it necessary that the trustees should be satisfied the principal was secured as well as the interest paid; he had no reason to suspect any thing on the occasion as regarded that particular item; but had a general impression that there was mis-management, but could not say that it was by Grace, and could not say by whom it was. He told the Dean that he thought they should satisfy themselves that the principal money was secured, as well as the interest received. He again communicated with the Dean in a few days after. During his year of office, he urged the necessity of making inquiries, and the Dean told him he would do so. He again pressed the Dean, and he said that he might rest satisfied the stock or part of it was secure, or something to that effect; that was all the communication he had during his year of office; he did not at that time know of any thing being done with a view to the ascertainment of how the funds were circumstanced. He never went or sent to the Bank. On his cross-examination, he deposed it was not a suggestion as to the money being invested; he did not question the investment, but the abstraction, and the Dean satisfied his mind.

The defendants then gave in evidence the five letters of attorney, bearing date respectively 22nd of November 1842, 16th of January 1843, 15th of June 1843, 17th of November 1843, and 10th of June 1845.

The first letter was as follows :—

“LETTER OF ATTORNEY, No. 15,390.

“FOR SALE, £3000 old  $\text{£}3\frac{1}{2}$  per cent. stock or annuities.

“Know all men by these presents, that we, the trustees of the  
 “charities of Joseph Evans, Esq. (under our corporate seal), do  
 “jointly, and each of us doth severally for ourselves and the sur-  
 “vivor of us, make, constitute and appoint Robert Corbet, of the  
 “city of Dublin, stockbroker, our true and lawful attorney for us,  
 “in our names and on our behalf, and also for and in the names  
 “and name and on the behalf of the survivor of us, to sell,  
 “assign or transfer all or any part of £3000, part of our share  
 “or interest in the old  $\text{£}3\frac{1}{2}$  per centum per annum Government  
 “stocks, annuities and funds, which are consolidated and made  
 “transferable at the Bank of Ireland by several Acts of Parlia-  
 “ment, to receive the consideration money and give receipts for  
 “the same, and to do all lawful acts requisite for effecting the  
 “premises, hereby ratifying and confirming all that our said at-  
 “torney shall do therein by virtue hereof; and in case of the  
 “death of all or any of us, this letter of attorney, as to all mat-  
 “ters and things which after our respective decease shall be done  
 “by our said attorney, by virtue of or under colour or in pursu-  
 “ance thereof, shall, so far as the Governor and Company of the  
 “Bank of Ireland are interested or concerned, be as binding upon  
 “our respective executors and administrators as the same would  
 “have been upon us if living, unless notice in writing of our  
 “respective deaths shall have been previously given to the Go-  
 “vernor and Company by our respective executors or administra-  
 “tors, or by some person or persons interested in the property to  
 “which this letter of attorney refers; and unless such notice be  
 “given, we hereby severally covenant, promise and engage, and  
 “bind ourselves and our respective executors and administrators,  
 “to and with the said Governor and Company of the Bank of  
 “Ireland, that our respective executors and administrators shall  
 “and do allow, ratify and confirm as good, valid and effectual  
 “against them and our respective estates, whatsoever shall or may  
 “be done by our said attorney after our respective decease, so

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852. "far as the said Governor and Company of the Bank of Ireland  
*Esch. Cham.*  
 BANK OF "shall or may be in any way or manner interested therein. In  
 IRELAND "witness whereof, we have hereunto set our seal the 22nd day  
 v. "of November 1842.  
 TRUSTEES "Sealed and delivered in the presence of us, by the Worshipful JAMES  
 OF EVANS' BURNHAM, Mayor of the city of Kilkenny, and the chairman of } L. S.  
 CHARITIES. the trustees.  
 "HENRY BIBBY, of the city of Kilkenny, a Master Extraordinary of  
 her Majesty's High Court of Chancery of Ireland.  
 "WILLIAM GRACE, of said city, Notary Public.  
 "I demand to act by this letter of attorney.—Witness my hand  
 this 23rd of November 1842. "ROBERT CORBET."  
 "Witness—J. ANDERSON."

The next letter, dated the 16th of January 1843, was thus attested:—

"Sealed and delivered in the presence of us, JAMES BURNHAM, Esq.,  
 Mayor of the city of Kilkenny, the chairman of the said trustees, } L. S.  
 he being thereto authorised by them.  
 "JAMES EDMONDS, of the city of Kilkenny, one of the High-sheriffs of  
 of said city.  
 "WILLIAM GRACE, of said city, Notary Public."

The next bore date the 15th of June 1843, and was thus attested:—

"Sealed and delivered in the presence of us, by JAMES BURNHAM,  
 Esq., Mayor of the city of Kilkenny, chairman of the said trustees. } L. S.  
 "ABRAHAM DENROCHE, of the city of Kilkenny, proprietor of *The*  
*Kilkenny Moderator* newspaper.  
 "WILLIAM GRACE, of the said city, Notary Public."

The next bore date the 17th of November 1843, and was attested as the preceding one by Henry Bibby and William Grace.

The next bore date the 10th of June 1845, and was thus attested:—

"Sealed and delivered in the presence of us, by The Rev. WILBER-  
 FORCE CAULFIELD, as their chairman, on the part and behalf of } L. S.  
 the said trustees.  
 "HENRY BIBBY, of the city of Kilkenny, a Master Extraordinary of  
 her Majesty's Court of Chancery of Ireland.  
 "WILLIAM GRACE, of the said city, Notary Public."

A similar demand at foot of each of these by Corbet to act thereon. T. T. 1852.  
*Exch. Cham.*

The defendants then closed their case.

The CHIEF JUSTICE then told the jury, that if they believed the evidence offered by the plaintiffs in support of the issues, the said five documents purporting to be letters of attorney were all forgeries; and that believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion upon the evidence, and come to the conclusion, that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclusively by the neglect or default of the plaintiffs; and in that case the jury should find a verdict for the defendants. And he further told the jury that in considering whether the use so made of the common seal of the plaintiffs was the exclusive cause of the imposition and fraud practised on the defendants, they should consider whether there was any neglect or default on the part of the defendants in examining the said letters of attorney or inquiring into their genuineness; and that if they were of opinion that there was such neglect or default, and that same in any degree contributed to said imposition and fraud, they should find for the plaintiffs. The jury found for the defendants.

Counsel for the plaintiffs objected to said charge, and called on his Lordship to tell the jury that if they believed that the said documents purporting to be letters of attorney were forgeries, the jury should find for the plaintiffs, notwithstanding the evidence adduced and relied on in support of the allegation of such default or neglect on the part of the plaintiffs. This his Lordship refused to do, and Counsel for the plaintiffs thereupon excepted.

The Counsel for the plaintiffs then called on his Lordship to direct the jury, that if they believed upon the evidence that the plaintiffs did not previously authorise and were not privy to the affixing of the common seal to the said alleged letters of attorney, or any of them, and did not by any subsequent act adopt the said letters of attorney, or any of them, or the transfer of the stock of the plaintiffs, made under colour of the authority of them,

BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

or any of them, they should find for the plaintiffs. This his Lordship also refused; and Counsel for the plaintiffs again excepted.

In Michaelmas Term 1848, the case was argued on this bill of exceptions, before BLACKBURNE, C. J., CRAMPTON, J. and PERRIN, J., when the exceptions were allowed, and a *venire de novo* awarded.

On this *venire de novo* the case was brought to trial a second time in the Sittings after Hilary Term 1849, before CRAMPTON, J.; the defendants did not appear, and a verdict was had for the plaintiffs.

Judgment having been entered for the plaintiffs on the verdict found in their favour on the second trial, the defendants obtained a fiat for a writ of error; in obedience to which, the CHIEF JUSTICE returned the transcript of the record into this Court on the 2nd of May 1849. That transcript set out the declaration, plea, *similiter*, a *venire* for Michaelmas Term 1847, that the Sheriff did not return the writ; and continuances were then entered up to the 11th of January 1849, on which day the Sheriff returned the writ of *venire facias juratores* served and executed. It then set forth that on the 1st of February 1849 the plaintiffs appeared before CRAMPTON, J., and that the defendants made default, and a verdict was accordingly had against them.

Prior to the issuing of this transcript, Counsel on behalf of the plaintiffs in error had applied to the Court of Queen's Bench, in Easter Term 1849, that the officer of that Court be directed (in case the record had not been made up), to include therein the several proceedings as they stood on record on the files of the Court; and that such record should comprise the pleadings up to the first trial—the bill of exceptions taken by the plaintiffs to the charge of the CHIEF JUSTICE at the first trial—the judgment of the Court thereon, ordering a *venire de novo*, and the verdict and judgment thereon. This application was refused as premature (a). This application was renewed in the same Term—the officer having served the plaintiffs with notice that he would not insert the bill

(a) See 12 Ir. Law Rep. 365.

of exceptions in the record, and was again refused—the Court being of opinion that it being an application in the nature of an allegation alleging diminution, the proper course in such a case was to issue the writ of error, and obtain a *certiorari* to return the record; and on the return to allege diminution, if the point sought to be inserted be omitted (a). The transcript was accordingly returned to this Court.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

On the 9th of June 1849, errors were assigned, stating that judgment was given for the trustees of the charities, which should have been given for the Bank of Ireland; and also error in this, that by the record rules, &c., remaining of record in the Court of Queen's Bench, it appeared, &c. (setting forth the proceedings on the first trial, bill of exceptions, and award of *venire de novo* thereon), and alleging that there was error in so awarding this *venire de novo*, whereas judgment ought to have been given for the Bank.

And that a *venire de novo* was awarded, but no *venire de novo* was returned or filed of record.

And that judgment for the trustees was founded on a verdict after the award of a *venire de novo*, whereas no such trial ought to have been had.

And this, that notwithstanding the verdict on second trial, judgment ought to have been given for the Bank.

And as *allegation of diminution*, there was in Court below a record containing said first Nisi Prius record, and said bill of exceptions, duly incorporated in the *postea* in pursuance of the statute.

And there was also remaining amongst the rolls of said Court a judgment or order awarding a *venire de novo* upon said bill of exceptions; so that said record was diminished and untruly certified, in not certifying entire of said record.

In Michaelmas Term following, the plaintiffs obtained a writ of *certiorari*, directing the Court of Queen's Bench to transmit into this Court the entire of the record, process and proceedings in this cause, which remained in said Court (b); and on the 23rd of

(a) *Vide* 1 Com. Law Rep. 394.  
 VOL. 3.

(b) *Ibid*, 396.  
 38 L



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

November, in pursuance of this *certiorari*, the documents required were returned into this Court, and similar errors were again assigned.

On the 1st of February 1850, Counsel on behalf of the plaintiffs applied to this Court that the transcript of the record so certified into this Court be sent back to the Court of Queen's Bench to be amended according to the record, as certified upon the return to the writ of *certiorari*; and the Court granted the application (a). And in Easter Term following, plaintiffs' Counsel moved the Court of Queen's Bench that the officer be directed to amend the record of the judgment in this cause, by introducing therein all the proceedings as they then stood of record<sup>1</sup> in this Court, comprising the pleadings up to the first trial—the record and finding of the jury thereon—the bill of exceptions taken by the plaintiffs to the charge of the CHIEF JUSTICE at the first trial, and the judgment of the Court thereon, awarding a *venire de novo*, and the verdict and judgment thereon. This application was refused, on the ground that the first transcript was regular, being founded on the *postea* and verdict therein recited; and that the bill of exceptions and the order for the *venire de novo* constituted no part of the record of the final judgment.

The record and documents having been again transmitted to this Court, and errors having been assigned, and a joinder in error, the case was argued by—

*Darley* and *Napier*, on behalf of the plaintiffs, and *H. Hamilton* and *Maddonogh*, for the defendants.

*Cur. ad. vult.*

June 23.

JACKSON, J., having stated the facts, proceeded to say:—

Two questions have been raised and argued before us—First, can we look at the documents returned to this Court upon the *certiorari*?—Secondly, if we can, and if we ought to consider them, was the judgment of the Court of Queen's Bench, allowing the exceptions, and awarding a *venire de novo*, right or wrong?

(a) *Vide* 1 Com. Law Rep. 407.

Upon the first question, it is contended by the plaintiffs' Counsel, that the transmiss first returned was a transcript of the judgment roll, which was made up in the Queen's Bench, agreeably to the practice ever since the Act of 28 G. 3, c. 31; and that the additional matter forms no part of the record, and is not properly before this Court. Secondly, that the records or matters returned to this Court upon the *certiorari* contradict the record, and therefore cannot be looked at by this Court.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

It is contended by the defendants, that the practice has not been uniform; but even supposing it has been the practice to make up the judgment roll omitting the bill of exceptions, and the rule pronounced thereon, in cases where the exceptions have been allowed, I do not think the party aggrieved by the setting aside of his verdict erroneously should be prevented from having that proceeding brought before a Court of Error for correction, at all events after final judgment.

It might be doubted, perhaps, on the authority of *Kennedy v. Gregg*, whether a writ of error could be brought on the award of a *venire de novo* before final judgment; but I confess I cannot see why the party who is deprived of his verdict, and against whom a *venire de novo* has been erroneously awarded, should be obliged to go to a new trial, and undergo the delay and expense of taking exceptions, and proceeding on to final judgment, before he could bring a writ of error. The object of the statute recited in the preamble was to prevent delay and expense, and there is nothing indicating an intention to oblige the party to wait for final judgment before bringing a writ of error. It enacts that the bill of exceptions shall be incorporated in the *postea*. This would appear to make it matter of record; and the award of a *venire de novo*, if not a judgment, is at least an award in the nature of a judgment.

In England this question never could have arisen: there the exceptions were never considered in the Court in which the action was pending. The exceptions were attached to the record, and sent at once to the Court of Error. That very able Judge, the late Chief Justice Tindal, in the case of *Lord Trimlestown v. Kemmis* (a), it

(a) 9 Cl. & F. 772.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

is true, gives to the House of Lords the opinion of the English Judges, and states that the Courts in Ireland in which actions depended had not the power, before the statute of 28 G. 3, c. 31, to deal with a bill of exceptions at all. No doubt, the practice in England is more conformable to the terms of the Statute of Westminster than the Irish practice; but, nevertheless, whether they had the power or not, there can be no doubt that the Irish Courts of original jurisdiction did, for more than a century before the statute of 28 G. 3, c. 31, deal with bills of exceptions. This is proved by 1 *How. Exch.*, p. 342, where the case of *Lessee Desmuna v. The Bishop of Killala* (in the year 1686) is reported. It would appear that the English Judges, however eminent and learned, were not well informed as to the practice and proceedings in our Irish Courts. One of the most distinguished of that very distinguished body, the late Lord Mansfield, appeared utterly ignorant on this subject. In *Lynam v. The King* (a)—which was taken by writ of error from the Queen's Bench in Ireland to the Queen's Bench at Westminster, in 1776—Lord Mansfield says:—"The next objection is, that the Courts below have gone into arguments on the bill of exceptions. It certainly is so. The Court has proceeded by *mistake* on the bill of exceptions, and gone into arguments upon it. *Until very lately there was no bill of exceptions in Ireland*, and they were at a loss in this case how to proceed." *Howard's Exchequer* was published in 1759 by an officer of that Court, and he gives the whole course of proceeding on bills of exceptions, going back, in one case, near a century; and there can be no doubt as to the practice.

With reference to the view I take of this case, it is rather a matter of curious and interesting research than at all necessary to our decision, to ascertain whether the practice of all the Courts has been uniform as to the mode of dealing with bills of exceptions—whether judgments were uniformly made up as the judgment in this case has been enrolled in the Queen's Bench, or whether both or either of the parties could bring error upon a decision of the Court in which the action depended upon the bill of exceptions, before final judgment.

(a) Cowp. 501.

It appears to me, that previous to 1759, the practice in our Court of Exchequer had been settled, and that *after final* judgment the party thinking himself aggrieved might bring his writ of error after judgment, and have the decision of the Court below on the bill of exceptions examined in the Court of Error (a).

But it is said, secondly, that these matters returned by the *certiorari* contradict the record, and therefore cannot be looked at by this Court. The first answer given to this is by the question—what is the record? Must we not take the *Nisi Prius* record, incorporating the bill of exceptions, and the award of a *venire de novo* by the Court, certified by the CHIEF JUSTICE, to be part of the record? But in what do those proceedings contradict the record first transmitted? Only in the continuances, which we have legislative authority (by 13 Vic., c. 18, s. 43) for treating as mere fictions and matters of form. Would it not be monstrous, at this time of day, to suffer parties to be deprived of their right to have the decision of a Court in matters of law reviewed, and, if wrong, to have them set right, by mere fictions and technicality? I quite subscribe to the rule that parties are not to be permitted to aver against the record; but this ought only to be held to apply to matters of substance, and not to mere expletives and matters of form. We have now all the proceedings, as they really occurred, before us, and we can reject the fiction, and supply its place with the reality. We can examine what has been done by the Court below in matters of law, and if there be error in those proceedings, we are bound, in my judgment, to rectify the error.

But though I have thus discussed the the two grounds upon which it has been insisted that we should not look into the matters returned upon the *certiorari*, it is not necessary for me to determine on either of them, for I think the judgment of the Queen's Bench should be affirmed, whether we have regard to these matters or not. If our attention is to be confined to the original transmiss, there is, confessedly, no error upon the record, and we must affirm the judgment; if, on the other hand, we are bound to examine the additional matter returned, I think the exceptions have been rightly

T. T. 1852.

Exch. Cham.

BANK OF  
IRELAND

v.

TRUSTEES  
OF EVANS'

CHARITIES.

(a) 1 How. Exch. 343.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

allowed by the Court below, and we should, in that case, also affirm the judgment.

This brings me to the second question I proposed to consider:—Was the judgment of the Queen's Bench, allowing the exceptions to the charge of the CHIEF JUSTICE, and awarding the *venire de novo*, right or wrong?

It appears to me, with all deference, that the exceptions taken to the charge are well founded.—[His Lordship stated the question submitted to the jury.]—The first clause would appear to present quite a different question, namely—Whether the use of the seal was caused *exclusively* by the default or neglect of the plaintiffs? But, I think, the meaning of the first clause must be interpreted by the second; if not, the charge is not consistent, and is objectionable on that ground. The use of the words "whether the use *so* made," in the second, shows we must so interpret it; and if so, it is manifest that there was not, and, in the nature of things, it is impossible there could have been, evidence that the use made of the seal (that is, the affixing it to the forged powers of attorney) was the *exclusive cause* of the imposition and fraud practised on the Bank. The affixing of the seal of itself gave no validity or efficacy to the power; it required due attestation according to the statute (which the Bank were bound to look to), and, therefore, the annexing and procuring that false attestation was, and must have been, partly the cause of the imposition and fraud, and, therefore, the affixing the seal neither was or could be the *exclusive cause* of that imposition.

It is, I think, plain that, taking the meaning of the charge according to the literal construction of either clause, there was not, and could not be, evidence to go to the jury to support the view presented by it; for how could it be said there was evidence that (according to the first clause) the neglect or default of the plaintiffs was the *exclusive cause* of the use made of the seal? It might, no doubt, have afforded the opportunity, but it is impossible to say it was the *exclusive cause* of affixing the seal to the forged power; for, notwithstanding the opportunity, it would not have been done to this day, unless necessity, or cupidity, or some other cause had supervened.

But suppose the meaning of the charge to be, that if the jury believed that the loss was sustained by reason of the exclusive neglect and default of the plaintiffs (that is, without any neglect or default on the part of the defendants), in that case the jury should find for the defendants. This is the sense in which, I think, it has been treated in the argument before us; and taking it in this sense, I think, in my opinion, the charge was wrong. Here the following questions arise:—Is negligence on the part of the plaintiffs a defence? Supposing that established, is the negligence imputed to the plaintiffs here of *such a nature* as to constitute such defence? Thirdly, is there evidence to go to the jury of such negligence? The charge assumes there is such evidence; in that the charge is wrong. The negligence imputed and mainly relied upon is, the allowing their common seal to remain in the uncontrolled custody of their agent Grace. The Act incorporating them undoubtedly empowered three of the trustees to order and dispose of the custody of the seal, and “of the use and application of it.” It does not appear, one way or the other, whether the trustees did, by any formal act, order and dispose of its custody. Suppose they had done so, and committed it to the care of a clerk or agent in whom they placed perfect confidence, or to one of their own body, would that amount to default or negligence? If it would not, it seems hard to say that what appears in this case would amount to default or neglect; because, in the supposed case the very same consequences might have resulted, which have unfortunately occurred in this case.

But suppose the conduct of the trustees does amount to default or negligence in regard to the custody of the seal, the next question arises, viz.—Is it *such neglect or default* as will constitute a defence to this action? It must be observed that this is not an action the gist of which is negligence. The declaration does not complain of negligence, but is founded upon positive breach of duty in withholding from the plaintiffs their legal rights. First, it charges refusal to transfer stock, of which plaintiffs were the legal owners and holders, to their legal appointee. Secondly, it charges defendants with permitting the plaintiffs’ stock to be transferred without any valid legal authority from them. Thirdly, it charges defendants

T. T. 1852.

*Exch. Cham.*BANK OF  
IRELAND

v.

TRUSTEES  
OF EVANS’  
CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

with refusing to pay to the plaintiffs the dividends which became payable to them on the stock, of which they were the legal holders and owners. In my opinion, no authority has been produced in the course of the able arguments we have heard, which tends to prove that neglect *merely* in regard to the custody of the common seal could afford a defence to such causes of action as these.

We must consider what is the nature of public stock or funds. How is property in them acquired and transferred?—and what is the duty of the Bank in regard to them and the holders? Stock or public funds are a debt due by the public to the original subscribers to the loan, or to the legal transferee of such debt, or of portions of it, by the original subscriber, or of the legal transferee thereof. Though it is a chose in action, a valid legal transfer may be made of it, but can only be made by the means prescribed by the statute. The 37 G. 3, c. 54, s. 6, enacts, "That it shall be lawful for the Governor and Company of the Bank of Ireland to authorise and direct persons to keep books, wherein all assignments or transfers of the said principal sum or stock shall be entered and registered in such manner as they shall direct, and *every such entry shall be signed by the person or persons making such assignment or transfer; or if such person or persons be absent, by his, her, or their attorney or attorneys thereunto lawfully authorised in writing, under his, her, or their hand and seal, or hands and seals, to be attested by two or more credible witnesses.*" The property in public funds or stock, therefore, cannot be divested (that is, transferred from one person or party to another), unless the entry shall be signed by the person making the transfer, or by the attorney thereunto lawfully authorised, in writing, under his or their hand and seal, to be attested by two or more credible witnesses. And this, perhaps, may account for the singular attestation to the genuine power of attorney to receive the dividends first set out in the bill of exceptions, viz., "Signed, sealed and delivered in the presence of us, by Parr Kingsmill, Mayor of Kilkenny, Joseph Bourke, Dean of Ossory," both these gentlemen being trustees. Perhaps it was considered they thereby satisfied the terms of the statute—the two trustees having signed, sealed and delivered the instrument, and likewise



attested the fact, and certainly the Bank acted on it as a sufficient power. But with regard to the five powers of attorney to transfer or sell, it is admitted that none of these were signed, sealed or delivered by the plaintiffs, or any of them—that they are forgeries. None of them, in the attestation, profess to be *signed* by the *trustees*; and, perhaps, in the case of a corporation aggregate that is not necessary. The first purports to have been *sealed and delivered* by James Burnham, Mayor of Kilkenny, and chairman of the trustees, in presence of two witnesses. But Burnham proves he never sealed and delivered any power of attorney, and never saw the seal, or authorised any transfer.

The next purports to be *sealed and delivered* (but it does not say *by*) James Burnham, Mayor, and chairman of the trustees, he being thereto authorised by them.

The third and fourth bear the same attestation as the first, and the fifth purports to be *sealed and delivered* in presence of two witnesses, by the Rev. Wilberforce Caulfield, as the chairman on behalf of the trustees. I have noticed the several differences between the genuine and forged powers of attorney. They will be important in reference to another question in the case; and there is this further observation, that Grace was the attorney to receive the dividends on the genuine power of attorney, but not on any of the forged instruments.

It remains to consider the duty and liability of the Bank. It is their duty (and they receive considerable remuneration from the public for the performance of it) to keep books in which all entries of transfers shall be made; which entries must be signed by the party transferring, or by his attorney, lawfully authorised, as we have seen. This is the only effectual conveyance or transfer of the property. It is also their duty, at their peril, to see that transfers are duly made. The Bank must also keep other books, in which are entered the names, descriptions and address of all original owners or holders of stock by transfer, and also a debtor and creditor account with every owner or holder of stock, showing the amount of stock of which each became possessed from time to time, and the amount which they transfer to others from time to time. These latter books

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

are indispensable, in order to show what precise amount of stock each person is possessed of at any given time, so as to guide the Bank in permitting or refusing to permit transfers to be made, and also to enable the Bank to ascertain the half-yearly dividends payable to each stockholder. But the entries in these latter books, or ledgers, have no operation at all upon the *transfer* of the property, which can only be effected by the signature of the party or his attorney to the entry in the transfer book. What then are the relative positions of the plaintiffs and the Bank? The plaintiffs are creditors of the public to a certain amount of principal debt, not ear-marked or tangible. Being so, they are entitled to transfer the whole or any part of that principal to any one they please; and, in the meantime, until they have done so, to receive the half-yearly dividends upon it. The Bank are the bookkeepers and accountants employed and paid by the public, who are the debtors, for superintending, permitting and recording the transfer—for keeping correct accounts to show who are the public creditors at any given point of time, and they are the medium through which the public pays to its creditors the dividends, or the principal, whenever the debt is paid off at par. It is obvious that no entries made or permitted by the Bank, the servants of the debtor, can divest the property of the creditor in his proportion of the principal debt. Nothing short of his signature, or that of his attorney, duly appointed, in the transfer book, can transfer it from him. Corbet, then, not having been plaintiffs' attorney to sell, his signature has not divested the plaintiffs' property; and if it remains in the plaintiffs, the Bank are bound to permit them to transfer when desired, and in the meantime to hand over to them the dividends which they have received for that very purpose. In this view, I conceive, the action in this case must be sustained upon the counts for not permitting the transfer, and for not paying the dividends. The trustees have suffered no loss, as yet, in respect of the principal.

The action, as between the Bank and the transferee of the stock, is subject to a very different consideration. The transferee accepts the transfer, and pays his money for the stock upon the faith and

responsibility of the Bank, representing the public, the debtor, who have permitted and recorded the transfer. The debtor is in justice, as well as in law, bound by the act of *their* servants. Besides, it would, in most cases, be impossible to trace or ear-mark it. I think the case of *Davis v. The Bank of England* fully supports this view. The doctrine established by it has been acted on in many cases, and was recognised fully by Lord Denman, C. J., in *Coles v. The Bank of England*, and in *Kelly v. The Bank of Ireland*: though Counsel have said *arguendo* that it has been disapproved of, and though the judgment was reversed in *The Bank of England v. Davis (a)*, it was only for want of an averment in the declaration that the Bank had received the money from the Government to pay the dividends, which averment has been carefully inserted in the present declaration; and that case has never been overruled. It may be hard on the Bank, but the security of the public requires that the responsibility should rest on the Bank. Best, C. J., in *Davis v. The Bank of England*, answers the argument from hardship well; in giving judgment, he says:—"We feel that the circumstances may occasion difficulty and embarrassment to the Bank. We think, however, that the Bank should be subjected to such difficulty and embarrassment, rather than the stockholder should suffer injustice. It is the duty of the Bank to prevent the entry of a transfer until *they are satisfied* that the person who claims to be allowed to make it is duly authorised to do so." Were the law otherwise, the whole property of every stockholder would be at the mercy of the clerks of the Bank. Such, then, is the state of the law, and such the public policy on which that law is founded. And therefore I hold that mere negligence on the stock-owner's part, and especially negligence entirely unconnected with the making of the transfer in question, cannot absolve the Bank from responsibility, if they permit his stock to be transferred without his authority.

I have said no case has been cited, nor have I been able to find any, in which such negligence as is here imputed furnished a defence to the action. I think they are all cases in which the party seeking to hold the Bank answerable was guilty of fraud or bad

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

(a) 5 B. & C. 185.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

faith in reference to the particular transaction, or had connived at the commission of the fraud by another, or had in some manner authorised the transfer, or recognised it as being valid after it had been made, or appeared to have been more or less implicated in or concerned with the particular transaction for which he sought to make the Bank answerable. If the trustees of the charity have been guilty of the species of neglect imputed to them (and I am far from saying that they have been as careful as they should have been as to the custody of their seal), the Bank having suffered loss thereby, they might, perhaps, maintain an action against the trustees. But I think they would probably be met by the defence they have set up to this action, for I do not consider the Bank free from blame in this matter. There was quite enough upon the face of the forged powers of attorney, if not to excite suspicion, at least to call for inquiry, and no inquiry was made. The striking difference between the attestation of the genuine power of attorney, and every one of the forgeries, was, in my mind, quite sufficient to make it their duty to ascertain the genuineness of the documents before they allowed a transfer, and, as Best, C. J., says, in *Davis v. The Bank of England*:—"The Bank may take reasonable time to make inquiries, and require proof that the signature to the power of attorney is the writing of the person whose signature it purports to be."

Much of what I have already said is equally applicable to the second charge of neglect imputed to the trustees—namely, that the trustees had been cautioned respecting the character and conduct of Grace, and had failed to take any precautionary measures whereby the loss of property might have been prevented; I shall only add, respecting it that, even supposing it were such neglect as would avail the defendants in this action (which, for the reasons I have given, I think it is not), yet it could only affect the last transfer; for it appears it was during Smithwick's mayoralty that Dean Vignoles received the caution. It appeared from the evidence that Smithwick's mayoralty expired at the close of 1844. He must have succeeded Burnham, who was mayor in 1843, and all the

forged powers of attorney appear to have been made during Burnham's mayoralty, except the last.

I am therefore of opinion that, whether we are to confine our attention to the transmiss of the record first sent up to this Court, or whether we are to extend it to the additional matter returned to the *certiorari*, the judgment of the Court of Queen's Bench is free from error. It is not, indeed, suggested that there is any error in the transmiss; and with respect to the rule pronounced upon the bill of exceptions, I think the exceptions were rightly allowed, that the *venire de novo* was properly awarded, the second trial and verdict properly had, and that the final judgment entered thereon ought to be affirmed.

BALL, J.

Two questions are to be disposed of in this case.

As to the first point, the proposition contended for by the defendants in error is this:—that the verdict on the first trial, and the bill of exceptions to the Judge's charge, and the allowance of the exceptions by the Court of Queen's Bench, and the award of a *venire de novo*, consequent on that allowance, constitute no part of the record of the judgment of the Court below, and consequently are not examinable by this Court, and ought not to be adjudicated upon on the present writ of error.

It is admitted, however, on the part of the defendants, that if, instead of allowing the exceptions, the Court below had overruled them, such overruling should appear on the record of the judgment, and consequently would be examinable upon a writ of error. Accordingly, the defendants' proposition is in substance this, that no reciprocity exists in point of law as between litigants circumstanced as are the parties on this record, in reference to the redress against an erroneous decision of the inferior Court, the party excepting to the Judge's charge being entitled to a writ of error if his exceptions be overruled; but the party deprived of his verdict by the allowance of the exceptions, having no right to a writ of error, and being left without any redress against an erroneous decision of the Court below, the effect of this doctrine would be, that the party having

T. T. 1852.  
*Exch. Cham.*

BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

the opinion of the Judge in point of law, besides the verdict of the jury, in his favour, and who therefore may be taken, presumably, to be in the right, is to be concluded by the erroneous judgment (as it may be) of the Court below; whereas the rights of appeal would be afforded to the other party, who, *primâ facie*, at least, would be supposed to be in the wrong. Against a doctrine so anomalous, and so fraught with apparent injustice, it appears to me that we are bound to struggle, and not to yield to it our assent, unless satisfied that it rests upon undoubted principles of law.

As an answer to this imputation of unreasonableness and unfairness, it has been urged, on the part of the defendants in error, that the judgment of the Court below, overruling exceptions, being in its nature final, is properly the subject of a writ of error; whereas the allowance of exceptions, according to the case of *Kennedy v. Gregg*, is only an interlocutory judgment, and therefore not the proper subject for such writ. If the case of *Kennedy v. Gregg* was rightly decided, such would appear to be its legal result; though if that decision were to be reviewed, it might perhaps admit of consideration, whether the allowance of exceptions should be deemed a mere interlocutory judgment, in the sense in which such judgments have been held not to be examinable upon writs of error; as, for example, in assumpsit, the judgments *quod computet*, and such like. However, taking that decision to be law, does it do more than serve to *account* for the anomaly, on the ground of the distinction between interlocutory and final judgments *quoad* the right to bring writs of error; without showing that the allowance of exceptions (even though it should amount to no more than an interlocutory judgment) should not appear upon the roll of final judgment when made up, and be thus examinable in this Court upon a writ of error brought on such final judgment? If it does not show this, it affords no answer to the argument based upon that anomalous condition of the litigant parties, which would be the result of the doctrine for which the defendants in error here contend.

But further, in answer to this objection, it has been argued, on the part of the defendants in error, that there is no more injustice in refusing a writ of error to a suitor deprived of his verdict by the

allowance of exceptions and the award of a *venire de novo*, than in refusing an appeal to a party whose verdict is set aside on a motion for a new trial. But is there not this distinction between the two cases, that in the former, the party whose exceptions are disallowed has his writ of error, while, if the exceptions be allowed, his opponent is without remedy? whereas on a motion for a new trial, the order of the Court, whatever it may be, is conclusive upon both parties—both are equally without redress.

Then it is said that there is nothing unfair or unreasonable in this anomalous condition of the suitor, deprived of his verdict by the award of a *venire de novo*, without any right of appeal from that judgment; because it was in his power to have appeared on the second trial, and to have, either by a second bill of exceptions, or a special verdict, raised the same question which had been disposed of by the allowance of the first bill of exceptions, and eventually obtained the decision of a Court of Error on the matter in controversy; but I cannot hold it to be either just or reasonable, that a party should be thus subjected to the delay and expense of appearing on a second trial, and encountering a second bill of exceptions or a special verdict, for the sole purpose of obtaining a decision which might have been had in the first instance by simply bringing under the review of the Court of Error the judgment of the Court below upon the first bill of exceptions: and it is the more difficult to feel reconciled to such a doctrine, when it is put forward on the result of the true construction of 28 G. 3, c. 31, a statute which, in its preamble, recites the object of the Legislature, in framing it, to have been to avoid the great delay and expense incident to bills of exceptions.

Then, upon what ground is it insisted that this Court is not at liberty upon this writ of error to adjudicate upon the allowance of the exceptions by the Court below? It is admitted that in England the doctrine here contended for on the part of the defendants in error would be altogether unsustainable, the Statute of Westminster having provided that exceptions shall be put upon the judgment roll, and further, that the Court of Error shall proceed to judgment, as to whether the exceptions should be allowed or disallowed, that

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

is to say, that both parties, and not merely the one whose exceptions are disallowed, are to be entitled to the judgment of the Court of Error. But it is contended that this provision of the Statute of Westminster has been impliedly repealed in Ireland, by 28 G. 3, and that the effect of that statute is to confine the right to the judgment of the Court of Error to the party whose exceptions have been overruled. To establish this position, the defendants in error rely, in the first place, on the language of the statute itself; secondly, on the practice in Ireland since the statute, furnishing, as they insist, a contemporaneous exposition of its provisions; and thirdly, they insist, that without contradicting the record made up in conformity with this practice, this Court cannot enter upon the examination of the judgment of the Court below allowing the exceptions, or adjudicate thereon.

As to the first point, they insist that the effect of the provision of 28 G. 3, c. 31, that the exceptions shall be incorporated with the *postea*, is to repeal, by implication, the enactment of the Statute of Westminster, that the exceptions should be placed on the roll for the judgment of a Court of Error; for inasmuch as the *postea* itself did not appear on the roll, the incorporation of the exceptions with that which was excluded from the roll amounted in effect to their exclusion also. I cannot say that this process of reasoning has satisfied my mind that the foregoing provision of 28 G. 3, c. 31, has had the effect of depriving of his writ of error, under the Statute of Westminster, the party prejudiced by the allowance of exceptions in the Court below. I find no such intention indicated by the recitals or preamble of the 28 G. 3, c. 31, and it does not occur to me that any sound reason exists for the introduction into Ireland of a rule of practice so essentially different from that which has prevailed for so many centuries in England. The incorporation of the exceptions with the *postea*, as directed by 28 G. 3, does not appear to me so inconsistent with the exercise of the judgment of the Court of Error, both for and against the exceptions, as provided by the Statute of Westminster, as to warrant me in holding that that direction amounts to a virtual repeal of the latter statute in the foregoing particular. I should rather hold that no sufficient ground appears

for the inference that any thing more was intended to be effected by the 28 G. 3, c. 31, than is expressed in its two enactments; the first enabling the inferior Court to dispose of bills of exceptions in the same manner as the Court of Error was authorised to do by the Statute of Westminster, and the second substituting the signature of the Judge to the bill of exceptions in lieu of his seal, which had been required by the Statute of Westminster.

It is then argued, on the part of the defendants in error, that, apart from the question of the repeal of the Statute of Westminster, by the 28 G. 3, c. 31, the allowance of exceptions should not appear on the roll of final judgment; for this reason, that such allowance is a mere order of the Court below on a matter collateral, and not a judgment of that Court. To establish this point, the precise terms of the statute 28 G. 3 are relied on; the Court below "shall have authority to examine bills of exceptions, and give judgment thereon, or make such order, either by arresting the judgment, granting a *venire de novo*, or otherwise, as shall be agreeable to justice." It is insisted that the term "judgment" is used in the foregoing enactment as applicable to the disallowance of exceptions only, and not to their allowance, and that the term "order" is there used as applicable to the allowance of exceptions, with the award of a *venire de novo* consequent thereon; however, Chief Justice Tindal, in pronouncing the opinion of the Judges, in *Trimlestown v. Kemmis*, which was adopted by the House of Lords in giving judgment in that case, appears to have put an opposite construction upon the above enactment, with reference to the meaning of the terms "judgment" and "order" therein contained. The words, "to give judgment thereon (says the Chief Justice), means either for the plaintiff or defendant, according to the merits of the exceptions;" that is to say, that it is equally a *judgment* of the Court whether the exceptions be disallowed or allowed, and a *venire de novo* awarded: and again, "to grant a *venire de novo* (says the Chief Justice) means the ordinary *judgment* when the exceptions are allowed," thus reiterating, in effect, the statement, that to grant a *venire de novo* is to pronounce a judgment. To this may be added, that as the term "order" is applied in the foregoing enact-

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF 'EVANS'  
 CHARITIES.



T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

ment, as well "to the arrest of the judgment" as to the award of a *venire de novo*, and as an order to arrest the judgment is admittedly itself a judgment of the Court, it appears reasonable to infer, that as "order" means judgment of the Court, when applied to arrest of judgment, it should have the same meaning when applied in the same sentence to the award of a *venire de novo*.

It is further contended, on the part of the defendants in error, that apart from all reasoning upon the construction which should be given to the 28 G. 3, c. 31—the practice which has prevailed in Ireland ever since the passing of that Act—of omitting from the roll of final judgment the bill of exceptions and award of *venire de novo* thereon, as if the latter were a mere order for a new trial—should be deemed a contemporaneous exposition of the statute, and conclusive of its true construction at the present day. Upon this I may observe, that the same evidence, whereby we are made aware of the existence of this practice since the passing of the Act, has also informed us that it existed in Ireland long before the Act passed; and this being so, it may be asked, whether it be entitled to be treated as a contemporaneous exposition of the statute? When a practice is introduced for the first time, consequent upon the enactment of a statute, and continued for a long period without interruption, it may be reasonable to infer that the new practice was adopted by the officers of the Court, on consultation with persons of competent judgment and information, and upon consideration had by the Judges, and with their sanction. It can hardly be presumed that any important alteration in the practice of the Court can take place under any other circumstances; such new practice, when uninterrupted and unquestioned after a considerable period of time, may be well entitled to respect, as a contemporaneous exposition of the statute in which it originated; but when a practice, instead of commencing on the passing of an Act, was in force long before, and was only *not altered* after the statute, it is quite another question whether, under such circumstances, any sufficient ground is afforded for presuming that the attention either of the officers of the Court or of the Judges was called to the construction of the Act, and whether it is not as reasonable to conjecture, that whereas before the statute the prac-

tice had been to treat the award of the Court below for a *venire de novo* as a mere order for a new trial, and in point of law it could be nothing more, and to omit it accordingly from the record of the judgment. The effect of the statute in giving legal validity, as a judgment of the Court below, to what had been previously a mere order of that Court, may not have been at all adverted to; and the old practice may have in this way remained unaltered.

But again, has this practice continued without interruption since the passing of 28 G. 3, c. 31? It may be observed, that the instances are not likely to have been numerous, when it could have been the interest of any party to question the validity of this practice. I apprehend it could have been only in the comparatively rare cases (like the present), when parties who had lost the benefit of the verdict they had obtained, by the allowance of a bill of exceptions in the Court below, and declined to appear on the second trial, and then brought a writ of error after final judgment, relying on the erroneous judgment of the Court below, in awarding a *venire de novo*. Two cases, however, have been cited (*Howard v. Shaw*, and *Begbie v. Clark*), wherein the parties so circumstanced appear to have asserted their right to have the award of the *venire de novo*, and the proceedings which led to it, set forth upon the roll of final judgment; and their opponents, instead of relying upon the practice of the Court, as precluding a review of the award of a *venire de novo* by the Court of Error, appear to have yielded the point, and consented to the bill of exceptions, and the award of the *venire de novo* being set forth on the roll of the judgment. Then it is said, that the practice in question, having no legal existence previous to the passing of 28 G. 3, c. 31, it was presumably for the purpose of legalising it that the statute was passed. It may be asked, however, what warrant have we for presuming such to have been the intention of the Legislature? The object of the Act appears by its recital, and by its express enactments. It recites, that it had been holden that the practice which had prevailed before the Act, for the Court below to entertain bills of exceptions and make orders thereupon, was not conformable to law; and it then proceeds to legalise that practice; but as to the practice here in question, of

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

omitting the bill of exceptions and the award of the *venire* from the record of the judgment, the Act is silent, making no reference to it, either in its preamble or in its enactments; and is it not reasonable to account for this, by the consideration that the omission of the bill of exceptions and the award of the *venire de novo* from the judgment roll, being a proper practice as long as such award amounted to a mere order of the Court below, it would cease to be such the moment when, by force of the statute, such award was to become a judgment of that Court, and consequently no legislation on the subject of that practice could be required?

Then, as to the assumed binding character of this long course of practice, see how other practices of Courts of Law in Ireland have fared when they come to be inquired into by the ultimate tribunal of the country. In *Gray's case* (a), the House of Lords had to consider a practice which had prevailed in Ireland from a remote period, of refusing to persons charged with felonies, not capital, the right of peremptory challenge; that practice had been throughout uniform and uninterrupted, and had been repeatedly sustained by the decisions of the Judges in Ireland; "and yet," says Judge Patterson, in delivering his opinion in the House of Lords (p. 465), on the question of its legal validity, "the practice "in Ireland appears to have been different, and there are decisions of very eminent Judges, against the allowing such challenges, before the present case arose. Those decisions are entitled "to great consideration, and should not be lightly overruled; but I "do not feel them to be of so stringent a force as to prevent us from "freely inquiring into their soundness." Accordingly, in conformity with his opinion, and that of all the English Judges, with a single exception, the House of Lords declared by their judgment the Irish practice to be unsound in principle and unsustainable in law, and they abrogated it accordingly. We are here dealing with a practice not uninterrupted and uniform, as in *Gray's case*, not sanctioned by repeated decisions of eminent Judges, but a practice apparently given up as unsustainable in the only two cases wherein parties

(a) 11 Cl. & F. 465.

appear to have had an interest in questioning its validity; uncoun-  
 tenanced by a single judicial decision in its favour, and which, instead  
 of originating in the passing of the Act, had existed long before,  
 and was suffered to continue, through inadvertence, as it may have  
 been, after the statute had impliedly rendered its continuance illegal.  
 I am aware that the Irish practice, which was condemned in *Gray's*  
*case*, was encountered by a contrary practice in England, and that  
 it had been relied on, not as an exposition of a statute, as here, but  
 as evidence of what was the common law on the subject: in those  
 particulars, therefore, it may be distinguishable from the present  
 case; but I cite it as an illustration of the length to which the  
 highest tribunal in the country is disposed to go, in order to sustain  
 sound principles of law, in the face of an erroneous practice in Courts  
 of Justice.

Finally, it is insisted that we cannot treat the allowance of the  
 exceptions and the award of the *venire de novo* as part of the record  
 of the judgment in this case, without contradicting the record itself,  
 which sets forth continuances by *vice comes non misit breve*, in lieu  
 of the proceedings on the bill of exceptions which actually took  
 place. To this, a sufficient answer appears to have been given, to  
 this effect, namely that the continuances being admittedly fictitious,  
 and having been declared by the Legislature, in the Process and  
 Practice Act (14 & 15 Vic.) to be mere fictions; and this Court,  
 having now before it, on the return of the *certiorari*, the proceed-  
 ings which really took place, is warranted in treating those pro-  
 ceedings as if they had been placed on the record of the judgment,  
 where, in point of law, they ought to have stood, and in giving  
 judgment thereon accordingly.

For the foregoing reasons, therefore, I am of opinion, upon the  
 first question, that the verdict, bill of exceptions on the first trial,  
 and the allowance of the bill of exceptions, and the award of the  
*venire de novo* consequent thereon, should be deemed part of the  
 record of the final judgment in this case, and examinable by this  
 Court upon the present writ of error.

As to the second question which we are called on to decide, it  
 amounts to this:—does the mere fact of the corporation seal having

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

been left in the custody of Grace amount to such negligence on the part of the trustees as disentitles them to recover in this action? I have said the simple fact of the committing of the seal to Grace's custody, because this is the only evidence given in the case which I understand is relied on, on the part of the Bank, to establish the charge of negligence against the trustees.

Something indeed was said by the Counsel in argument at the bar, on behalf of the Bank, as to the evidence given, to the effect that some suspicion had been entertained in reference to Grace's conduct on a former occasion; this suspicion appears to have occurred to one of the trustees, but it was years before the transaction in question, and it was stated to have been afterwards removed from his mind; and furthermore, it had no reference to any misconduct on the part of Grace with respect to the seal, but it related to another matter, foreign to the present inquiry. Under these circumstances, I do not consider it a transaction which ought to affect our judgment upon the question at issue.

Upon that question, my opinion is in favour of the trustees. I distinguish between the simple committing of the seal to Grace for safe custody, and permitting him to make use of it for any purpose; and I apprehend that a great deal of the argument used against the trustees has resulted from the confounding together of two things essentially distinct, namely, the bare custody of the seal, and the permission to use it. Had the trustees authorised Grace to affix the seal to such instruments as were required to be executed on the part of the corporation, and he had abused his authority by affixing it to instruments for the transfer of the stock of the corporation for his own private purposes, possibly the Bank might have established a defence against his claim, on the ground that the trustees, having confided to him the use of the seal, had made themselves, in some sense, parties to any abuse of it he might commit. I give no opinion as to whether, even in that case, this action could have been successfully defended under the circumstances which occur here; but the question with which we have to deal is wholly different. The custody of the seal must have been entrusted to some person.

Grace appears, upon the evidence, to have been at the time a man of respectable character, and he held the confidential office of secretary to the trustees; to him, then, naturally and reasonably was confided the custody of the seal. That he should make use of it for the commission of a forgery, was neither the necessary, nor natural consequence of its being left in his care; he was not armed with any authority to make use of it for any purpose; and if he did, without authority, affix it to an instrument, that mere act alone imparted no validity to the document, inasmuch as the signatures of two witnesses attesting the fact of the seal having been affixed by proper authority appears to have been essential, to validate the transaction, as the affixing of the seal itself. The trustees must be taken to have been aware of this, and the question may therefore be asked, with reason, to which of the two parties the charge of negligence is imputable in this transaction—to the trustees, who must be taken to have known that the mere affixing of the seal by Grace, without due authority, could not authorise the transfer—or to the Bank, who appear to have made no inquiry as to whether, in point of fact, the requisite authority for the affixing of the seal had been given, so as to warrant them in giving effect to the transfer? It may be admitted, that in leaving the seal in the custody of Grace, the trustees afforded to him, to a certain extent, an opportunity of attempting the commission of forgery; that the possession of the seal even furnished him with a temptation to commit it, and that the trustees may thus, in some sense, have contributed, indirectly and remotely, to the perpetration of the offence; but if this were to amount to negligence on their part, constituting a defence to this action, could they have acted in almost any respect, with reference to the seal, in such a way as to be secure against the charge of having been the indirect or ultimate occasion of the forgery being committed? Suppose that, instead of entrusting the custody of the seal to their secretary, they had left it in the care of one of their own body, and that he, by having the possession of the seal, had been enabled to transfer the stock of the corporation, as was done by Grace; or suppose, that without committing the custody of the seal to any one trustee, they had kept it

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

E .T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

in their joint possession, under lock and key, and that the key or keys had been lost by accident, and that some person had been enabled, by finding the key, to obtain possession of the seal, and to make use of it in the commission of a forgery; or, suppose the mechanical construction of the lock not to have been of a character so superior as to defy any attempt to open it without the key, and that in consequence it was opened by undue means, and the seal was abstracted, and a forgery thereby committed: in all these cases, the act of the trustees in reference to the seal, or their manner of disposing of it, may be said to have been the indirect or remote cause of the forgery being committed; and yet, could negligence be imputed to them as a defence against their claim for redress against the forgery? Again, take the case of a party having an account at a banker's, and not being in the habit of locking up his cheque book, and suppose some person in his establishment to abstract from it a blank cheque, and forge his name to it, and thereby obtain money from the banker; the omission of the party to lock up his cheque book may have indirectly enabled the other to commit the forgery, and yet, could that omission be relied on successfully as a defence to an action for the recovery of the amount obtained by the forgery? If it could, where would you draw the line between acts or omissions on the part of the plaintiff in such an action, which would disentitle him to recover, and those which would not have that effect? It would come to this, that no man would be safe in allowing his signature to go abroad, lest some person should, by close observation of the handwriting, become enabled to copy it successfully, and thereby to commit a forgery; for the man who writes his signature, and allows another to look at it, may, by so doing, indirectly enable that other to become familiar with it, and to forge it. Under all the circumstances, it appears to me, that to establish a case of negligence in the trustees, which should disentitle them to recover in this action, something done or omitted by them, in reference to the very act of forgery itself, should have been shown; they should have been proved to have been directly concerned, to some extent, at least, in the framing of the forged instrument.

The cases on the subject which have been cited at the Bar appear to sustain this view. Where a person signed a bank cheque, and left it negligently in the way of another party, who filled it up without the authority of the former, and obtained money upon it, the transaction was one in which the person who, in the first instance, attached his signature to the cheque, became thereby participant, as it were, in the framing of the forged instrument, and contributed directly to give it currency. In like manner, where a person, in drawing a cheque, incautiously left a space blank immediately before the sum for which the cheque was drawn, and thereby enabled another to prefix an additional sum to that which the drawer had inserted, the latter, by his own negligence in the manner of drawing the cheque, whereby he afforded to the other the means of committing the forgery, became himself, in some sense, directly and immediately a contributor to that result.

If this be a sound view of the law as applicable to the present case, it disposes of the second question in favour of the trustees; and this being my view, I am of opinion that the exceptions were rightly ruled by the Court of Queen's Bench in their favour, and that the judgment of that Court should in this respect be affirmed.

PERRIN, J.

In my opinion, there was no valid defence to the plaintiffs' action. I shall first advert to the statutes 7 Vic., cc. 4 & 5. By the provisions of these statutes, stock was placed under the management of the Bank; and it is to be observed, there is an essential difference between the provisions of these statutes and the 37 G. 3, c. 54, creating this stock. The annuities created by the 7 Vic., cc. 4 & 5, were enacted to be a joint stock, and that all persons and bodies corporate should have a proportional interest and share therein, and the annuities attending the same, which shall (the stock or share, and the annuity attending the same) be assignable and transferable, as this Act directs, and *not otherwise*. They also provide that a book shall be kept in the office of the Accountant-General of the Bank, wherein all assignments or transfers of stock and proportionable annuity shall be *entered and registered*, in pro-

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

per words for that purpose, and *signed* by the party making the assignment or transfer, or his or their *attorney lawfully authorised by writing under his or their hands and seals, to be attested* by two or more *credible witnesses*; and the assignee may indorse his acceptance; and *no other method* of assigning or transferring said stock and annuity shall be good and available in law. They further provide, that all persons or corporations entitled to any such annuity, their executors, successors and assigns, and all persons *lawfully claiming* under them, shall have *good, sure, absolute and indefeasible* estates and interest in said annuity, and shall be *possessed* thereof as of a *personal estate*, devisable as such, &c.; that the Bank officers and servants are to be indemnified for all things done or permitted to be done *pursuant* to this Act, and the same not to be questioned or impeached in any Court to their prejudice or detriment. And they direct that the Bank shall appoint a cashier and Accountant-General; that the moneys applicable to pay the annuities shall be issued to the chief cashier, who shall apply and pay same, and that the Accountant-General shall inspect and examine all receipts and payments of cashier, and *vouchers relating thereto*—that must include the transfer and authority which entitles claimants to the annuity or dividend, letters of attorney, probates and administrations—in order to prevent any fraud, negligence or delay.

The plaintiffs had been possessed of the stock—they had that proportional share and interest therein, and the annuities attending the same, which was entered and registered in the books of the Bank, kept in the office of the Accountant-General. They were entitled to the annuity attending that stock, and had (in the words of the Act) a good, true, absolute and indefeasible estate and interest in said annuity, and were possessed thereof, as their personal estate, assignable and transferable, as the Act directs, and *not otherwise*; that is, by assignment or transfer entered and registered in the books of the Bank, signed by them, or their attorney, lawfully authorised, by writing under their hands and seal, attested by two or more credible witnesses; no other assignment of stock and transfer can be good and available in law. The stock was not

transferred by them, or their attorney, lawfully authorised; therefore they remained entitled to it and the annuity attending it, that is, to the dividends or interest, and continued to have their absolute and indefeasible estate therein, and to be possessed thereof as their personal estate, and entitled to assign and transfer it, as the Act directs; and the Bank having refused to pay the dividends or annuity accrued due, and to permit the transfer pursuant to the Act, the plaintiffs were entitled to a verdict.

The letters of attorney, produced by Corbet, were forgeries—they were not the acts of the plaintiffs—they never authorised Corbet to act—he was not their attorney—they were not privy to, nor adopted, his act; therefore they remained entitled to and owners of the stock; their estate, interest and possession continued undisturbed and unaffected by these forgeries, or by any thing done by Corbet, or permitted by the Bank, under them; they remained the owners entitled to receive the interest and annuity, and to transfer the stock—they, and they only—no one else, by, *pursuant, and according to the plain words and enactments of the statute*: and therefore the Bank were bound to pay the dividends and permit the transfer demanded by Colles, and not to refuse to do either, and transgressed their obligation and the enactments of the statute in each such refusal; and there ought to be a verdict for the plaintiffs, unless the facts in evidence presented some other sufficient defence. *Davis v. The Bank of England* is exactly and directly in point; it has not been shaken, and is, in my mind, law. The *Attorney-General* cited no authority for his assertion disparaging it, or that an action for money had and received had been substituted.

For the defendants it was urged, that if the jury believed that the use made of the common seal in the several forgeries and counterfeits of the letters of attorney, fabricated by Grace feloniously affixing the seal to them without the privity or authority of the plaintiffs, and forging and procuring the false attestations of due execution thereof, and the successful utterance thereof, through Corbet, to the officers of the Bank, whereby the defendants were imposed on and defrauded (that is, whereby the fraudulent and fictitious transfers were entered, made and permitted in the Bank

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

books), were *caused exclusively* by the neglect and default of the plaintiffs, they should find for defendants; but thus qualified, if there was (in their opinion) any neglect or default of defendants in examining or inquiring into the genuineness of the forgeries, which contributed to the imposition, they should find for the plaintiffs.

For the plaintiffs it was insisted, that the evidence adduced and relied on, in support of the allegation of such neglect or default, did not excuse or justify defendants in acting on the forgeries. That if they were forgeries, the plaintiffs were entitled to a verdict, unless they did, by some conduct of theirs, adopt the forgeries or the transfers made thereunder, and thereby estop and disable themselves.

The CHIEF JUSTICE told the jury, that on the evidence the letters of attorney were forgeries; that, therefore, they were bound to find for the plaintiffs, unless their fabrication and imposition on the defendants was caused exclusively by the neglect and default of the plaintiffs—that is (as argued), without any neglect or default on the part of the defendants, to examine them or inquire whether they were genuine: that is, that though they were forgeries, yet, if their fabrication and imposition upon the defendants was caused exclusively by the neglect and default of the plaintiffs themselves, in the absence of any neglect or default on the part of the defendants, the plaintiffs could not recover from or make the defendants responsible for a loss caused by their own (exclusive) mere fault, and to which the defendants in no part contributed. As an abstract proposition, this proposition and direction seems unquestionable, and therefore, though the jury might have been mistaken in their opinion and conclusion on the matter of fact *upon the evidence*, yet as there was no evidence, the propriety of the proposition and the direction fails; therefore, though the plaintiffs' Counsel did not say that *there was no evidence* that the fabrication or the imposition was caused by the default of the plaintiffs, nor insist that there was specific evidence of default on the part of the defendants, and call upon the CHIEF JUSTICE to direct the attention and consideration of the jury thereto, and that if they believed thereupon that there was default on the part of the defendants, which contributed or

occasioned the imposition and loss, to tell them to find for the plaintiffs; yet, they called on the CHIEF JUSTICE to say, that if there was evidence to satisfy them that they were forgeries, they should find for the plaintiffs, notwithstanding the evidence relied on by the defendants—that was to withdraw the whole case from the jury, save the consideration of the (admitted) fact that they were forgeries. May it not be thus maintained, viz., for that, if forgeries, no evidence has been offered on the part of the defendants to preclude or bar plaintiffs' claim to their admitted share of the stock, to raise any bar or estoppel to their otherwise undeniable undoubted right, none of any legal defence, or which ought to be submitted to the jury? And, secondly, that if they were forgeries (which plaintiffs did not authorise or know of), never adopted by the plaintiffs, either the letters themselves or the acts done under colour of them, they should find for the plaintiffs? There was no evidence to raise the question or qualification, whether the fabrication and imposition had been caused merely and exclusively by the default of the plaintiffs, or to warrant the Judge in submitting it to the consideration of the jury; it could not, with propriety, be submitted to them, and the exception is proper. The case appears to have been left to the jury altogether, the CHIEF JUSTICE telling them that, if they believed the forgeries, and their successful utterance and fraud, was caused by the default of the plaintiffs, they should find for the defendants, without specifying any default or evidence of default, or directing their attention to any; but if there was any neglect or default of defendants in examining or inquiring into the authenticity or genuineness of the forgeries, which contributed to their imposition and fraud, to find for the plaintiffs.

I have already, in the Court below, expressed my opinion, and the grounds on which I founded it, at great length. I shall not repeat them here; but after much consideration and reflection and attention to the arguments on this head in this Court, I feel bound to adhere to that opinion. I am satisfied there was no evidence of any neglect or default, which would have caused the acts comprised in the ambiguous phrase "the use of the common seal," a phrase very likely to perplex and mislead, rather than direct the jury.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852. The case went to the jury as if the seal only was necessary to the printed form. If the seal when affixed made a perfect instrument (as some seals do to some instruments), on proof of the seal, then the permission to Grace to hold the seal would have enabled him to make the transfer. The corporation would thereby wilfully enable him to cause the Bank to believe it genuine, and to induce the Bank to act on it and that belief, so as to alter their position—to sanction the entry of a transfer of the stock by Corbet as their attorney, whereby not only is the transfer entered as made by the corporation, and from them of their property to another, but the Bank became liable to that other for that amount; and in such a case, according to *Prichard v. Sears*, the corporation would be concluded from averring that a different state of things existed at that time, or that that state of things, of which they had before caused the Bank to believe the existence, and on faith thereof to act, did not exist.

But is that the true statement of this case? It is not. The seal, though affixed, did not make a perfect instrument, nor one which, on proof that it was the genuine seal merely, could or would have enabled Grace, by Corbet, to make the transfer. It is established doctrine, that though no formal delivery is necessary to be proved, to validate the deed to which the seal is affixed, yet if the intent be different, and that act is accompanied with a direction to retain it until a condition performed, the deed is not effective; and here, by the positive, express enactments of the statute, if the owner or seller of stock be absent, the entry of the transfer shall be signed by his or their attorney, lawfully authorised, in writing, under his or their hands and seals, to be attested by two or more credible witnesses; so that the mere production of the letter of attorney, with the genuine seal affixed, was not sufficient—that, merely, did not authorise Corbet to sign the entry; the attestation of two credible witnesses was a previous requisite that it had been affixed by the order and direction of the corporation or trustees, or a majority of them. The corporation enabled Grace to attach the seal to the letter of attorney, but they did not authorise him to do so; the attestation was as essential as the seal, and required exami-

nation and inquiry as strict and perfect as the genuineness of the seal—perhaps *more so*, as any *other seal*, if affixed by order of the trustees, would make a perfect deed.

Was there any proof of, or foundation for, the assertion or proposition, that the corporation wilfully enabled him to cause the Bank to believe the letter of attorney genuine? If the plaintiffs had kept the seal, and not left it with their servant or officer, the fraud could not have been committed with the same facility, the seal itself could not have been applied—plaintiffs afforded the means of fixing the impression; but the impression alone did not confer authority: a seal might have been made from bread or soft wax from an impression; attestation by two credible witnesses was necessary. The Bank were bound to look to, and see a true and genuine authority for a transfer—to be acquainted with the corporation—the members—their titles—whose seal it was—whose property they disposed of—to have their authority to dispose of their property. They had a genuine letter of attorney, sealed with this seal, and signed by two of the members, authorising them to pay the interest on their share in the new £3½ per cents. to Grace. They were bound not to transfer unless the apposition of the seal was attested by two credible witnesses; there was time allowed and taken for examination and inquiry, and none made; the attorney and stockbroker could have told them who put him in action—to whom he was to remit the proceeds. The officer of the Bank did not do his duty. He made no examination nor inquiry as to those letters of attorney, the vouchers for the transfer, and the authority for them, and the future payment of the annuity or dividends to the vendee or transferee, which it was the duty of the Accountant-General, or other officer under him, to examine and authenticate. There was no evidence of any examination, nor, indeed, of what would have been proper or sufficient examination; but here there was none. The transfer was made upon the similarity of the impression or seal—no inquiry as to the execution, as to the attestation, or of or from the witnesses, or from the broker. On these documents the Bank transferred, or permitted the transfer, of £9000 of the plaintiffs' property. Would the Bank have paid

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

£9000 of their own money on such documents, or on such non-inquiry? What would any purchaser, if acting for himself, have required? Would he have paid £9000 without seeing for whom Corbet was acting? and would he have taken Grace's attestation to his own title deed? Would he not have satisfied himself from the attesting witnesses? Would he not have contrasted them with that attested by the signatures of two of the trustees, the Mayor and Dean? It was the duty of the Bank to examine and be satisfied that the power of attorney was genuine, as well by the seal as also by the attestation, and by inquiring from Corbet, who demanded to act by it, who procured the blank draft—who transmitted it for execution—who brought it executed, and required to be admitted as attorney of the trustees—by inquiry concerning and from the attesting witnesses, who they were—whether interested—why it was not signed by two of the trustees, to attest the delivery and sealing, as the letter of attorney to receive dividends had been and was.

I am, therefore, satisfied that this case was not properly sent to the jury. I do feel that justice has not been done—that further inquiry was requisite, and the opportunity for that was given.

I regret very much that the advice given by my LORD CHIEF JUSTICE and myself to the Bank, if they intended to defend further, was not followed, viz., to have a special verdict: they have not done so, nor pursued the usual ordinary course on such occasions, when a *venire de novo* is ordered, to appear and offer further evidence, if they had it; if not, they should except to the opinion which the CHIEF JUSTICE announced that he should adopt. They have done neither—they have not appeared on the trial. What evidence has been given, we know not; but a verdict was had before my Brother CRAMPTON, which, I presume, was perfectly satisfactory to him, upon sufficient evidence, sent with proper caution and direction to the jury, and, most probably, under the surveillance of those concerned for the defendants. The defendants have, by a perfectly new course and practice (a practice calculated, if not contrived, to avoid further inquiry, and baffle the plaintiffs, whatever may be the justice of the case—upon a question quite

beside the real merits), namely, upon the form of the exceptions. I own I am surprised, nay, more than surprised, that such a body as the Directors of the Bank of Ireland have taken that course, and that they have been so advised, if their eminent Counsel have so advised them—to hold by a verdict on a chance misdirection, the ambiguity of which has raised difficulty, and endeavour to obtain a judgment, not on a full and considered opinion of the case, but on a *Nisi Prius* accident. On that subject my opinion is only material as to the legal result; and I am of opinion that the course they have taken, though it has prolonged litigation and delayed justice, ought not to defeat it.

The exceptions having been allowed, a new trial was to be had, and an order for a fresh *venire* made, as the former *venire* was exhausted by the imperfect trial. That was done according to the practice of the Queen's Bench, as far back as can be traced, and also to the practice of the Common Pleas and Exchequer. It was the universal practice, in Ireland, as far back as the statute 10 *Hen.* 7, when 13 *Edw.* 1 became law here. The practice has been to discuss the matter of the exceptions on the return of the *postea*, with which it is incorporated; and if the exceptions be disallowed, and the ruling of the Judge affirmed, and the verdict upheld, to enter judgment thereon: when the bill of exceptions, as well as the verdict, being part of the *postea*, are incorporated with the record or plea roll, and remain thereon; or if they are allowed, and the ruling disaffirmed and overruled, the verdict is put aside with the *postea*, and a new trial had upon a fresh *venire de novo*, which issues upon a rule or order of the Court, and has not, in practice, been entered on the record, no more than in any case when a new trial is granted on motion, and a *venire de novo* issued for that purpose. When the former *postea*, and the verdict thereon, disappear, such a new trial is had, where the party may put his objection and legal view upon the record by an exception to the considered judgment without increased expense and delay, and if the party be dissatisfied with the ruling of the exceptions, he is not precluded from having them considered by a Court of Error. He may except, at the new trial, to the new rule

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

against him, and insist upon the law as laid down by the Judge at the former trial, and there is neither injury nor delay. A *venire de novo* issues in every case where there is a new trial after a verdict set aside, either on motion, or allowance of a bill of exceptions, or after argument of a special verdict: *Lounder case (a)*. In Ireland it is the same in form after a bill of exceptions as after a rule for a new trial.

Such was the practice in Ireland from the oldest period, as appears not only from *Howard*, but *Cowper* and *Blackstone*. In *Davenport v. Tyrrell (b)*, the Judge directed the jury to find for the plaintiff—the exceptions were sealed and returned to the Court with the *Nisi Prius* record. After argument, and judgment for the defendant on the examination of the bill of exceptions, it was held wrong for the Irish Court to determine on a bill of exceptions contrary to the general practice. *Blackstone*, in his argument, says, the construction is warranted by cases, and is agreeable to reason and common sense; so, in *Symmers v. The King*, Lord Mansfield objects that the Court below heard arguments on the exceptions—he says, “that was by mistake, until very lately there was no bill of exceptions in Ireland.” And shortly after these cases, contrary to, and disturbing a practice of 500 years, and after the appellate jurisdiction was restored to the Lords in Ireland, in 1788, the 28 G. 3, c. 31, was passed, reciting—“Whereas it has been holden” (alluding to those cases so held contrary to the Irish practice) “that bills of exceptions taken to the opinion of a Judge at *Nisi Prius* are not examinable in the Court in which the action is brought and depending, and are only to be examined in error in a Superior Court;” it then enacts, “that it shall be sufficient for the Judge to sign such bill; and such bill, so signed, shall remain with the clerk of *Nisi Prius*, to be incorporated in the *postea*, and returned therewith to the Court, which shall have authority to examine the *same* (the *postea* including the bill of exceptions), and give judgment thereon (that is, on the *postea* and its contents, they could give no judgment without the *postea* and verdict), or make such order (contrasted from judgment),

(a) 3 Salk. 317.

(b) 1 W. Blac. 675.

"either by arresting the judgment, granting a *venire de novo*, or otherwise, as shall be agreeable to justice." The object of this Act was to give the Court above a power to deal with the record in a manner they did not then possess. At this time Ireland was an independent kingdom—the law of Ireland only had authority; there was no appeal or writ of error. The English Courts had no more power of making laws for it than they had for Scotland. The statute was passed, manifestly, to validate and maintain the established ancient practice and law of Ireland. The construction put upon a bill of exceptions, the practice whereby it was returned with the *Nisi Prius* record incorporated into the *postea*, and whereby it disappeared with the *postea*, and the order for a fresh *venire*, therefore, do not appear on the roll; that is, the plea roll—for the *postea* is not put on the plea roll until judgment is given on the *postea*. The attention of the English Judges could not have been called to the meaning of the Act; if it had, they would not have dealt with it as they have done.

It is assumed that the order for a *venire de novo* means more than a fresh *venire*, which issues on every new trial. On the allowance of the exceptions the verdict drops, and the rule for a fresh *venire* is equivalent to, and treated as, an order for a new trial; and such are the provisions of the statute, that the bill of exceptions shall remain with the clerk at *Nisi Prius*, and be incorporated with the *postea*, and returned therewith to the Court, which shall have authority, as heretofore, to examine the same. Notwithstanding these new notions, that "to give judgment thereon," means, as a writ of error might in England, or "make such order either to arrest the judgment" (which was then a matter extrinsic), or "grant a *venire de novo*, or otherwise, as shall be agreeable to justice" (distinguishable from a judgment)—if it does not mean make such order as they shall think agreeable to justice, without any limitation, there is no fixed meaning in words. A *venire de novo* does not mean a second *venire* to be awarded on the record, and so recorded, but as in the practice on a new trial. I do not think, therefore, that the view taken by Chief Justice Tindal and the other Judges ought to upset

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

that construction, both before and since the 28 *G. 3*, c. 31. It is, under the circumstances, entitled to the weight and to the opinions of such men. I do not think they were aware of the Irish practice—English Judges are naturally ignorant of the Irish practice. They did not advert to the fact that, at the passing of 28 *G. 3*, c. 31, Ireland was an independent kingdom; that it made and construed its own laws; that the appellate jurisdiction of England was abolished: therefore, the construction of that statute was to be looked for in the Irish Courts and practice, as little dependent on English law as Scotch law. I am, therefore, of opinion, that we are bound by the practice of all the Irish Courts, as far back as memory and inquiry can go, by the Irish construction of the statute, settled and acted on since its enactment. It is no hardship to the party. He had, as Judge CRAMPTON observes (426), his remedy, and he chose to waive it. He might have appeared at the second trial, and had his bill of exceptions or special verdict, and thus take his case on to the highest tribunal. I think these documents, certified on the *certiorari*, form no part of the record; and for that reason I reject them, and on no technical ground.

I have gone into the consideration of the exceptions, although unnecessary, according to the view I take of the case; but to show that no injustice, and that there should be no misapprehension on that ground, which might militate against allowing the ancient practice of the Irish Courts. I, therefore, am of opinion that the judgment of the Court below ought to be affirmed.

CRAMPTON, J.

Two questions arise in the case, both of them of *great* importance. They are these:—First, is the *postea* of the first trial to be deemed a part of the record of the judgment now before us? Secondly, supposing it to be so, were the exceptions, therein incorporated, rightly ruled by the Court below?

We have now before us these matters—one is a transcript of the judgment, as enrolled in the Queen's Bench, and certified as such in answer to the writ of error. This shows a judgment perfect

and complete in itself, and which is admitted to be free from error. The other is the original *postea* of the first trial, including the bill of exceptions, together with a *copy*, from the rule book of the Queen's Bench, of the order for a *venire de novo* under that *postea*. This latter matter has been brought into Court by a *certiorari*, alleging diminution, and returned by the CHIEF JUSTICE in obedience to that writ. The *certiorari* and return do not decide the question of diminution. They are but the evidence upon which the Court has to pronounce its opinion, that there was or was not diminution. Generally, a *certiorari* issues as of course. In this case it was awarded upon the motion of the plaintiff in error, perhaps improvidently, but the effect of the writ and return are in law exactly the same.

And now arises the first and most important question—are these proceedings so returned to be deemed a part of the record of the judgment? And do these omissions from the transcript and the judgment below sustain the allegation of diminution? If they should have been entered on the roll below, then there is diminution; if not, the allegation of diminution fails, and in that event there is no error, and the judgment must be affirmed. The answer to this first question seems to depend on two considerations—the practice of the Queen's Bench, and the construction of the Irish statute 28 G. 3, c. 31; and these considerations appear to me to be *intimately connected with each other*.

First, as to the practice. It is clear to me that the practice of the Queen's Bench, as well as of the other Irish Law Courts (with two remarkable exceptions, upon which I shall observe hereafter), has been uniform, and that practice—a practice of at least a century and a-half. That practice has been, where there have been two trials, whether the second trial grew out of an order for a *venire de novo* upon a bill of exceptions, or an order for a new trial, upon motion for that purpose, in making up the judgment, to take no notice of the former trial, but to proceed by continuances of *vicecomes non misit breve*. The judgment in the present case is so made up; and upon the ground of this practice, as well as for other reasons, the Court of Queen's Bench refused to amend the

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

record by inserting the proceedings on the first trial; and in the late important case of *Kean v. Stronge*, in which case there were two bills of exceptions, the record was so made up. The record thus made up is unincumbered by an unnecessary detail of proceedings which have been superseded, and the anomaly of having two perfect and conflicting verdicts upon the same roll is avoided; but at all events, the application of the same form of entry to both classes of new trials in this country is a remarkable circumstance, and seems to have no small bearing upon the construction of the statute of 28 G. 3, c. 31.

Before that statute, the Irish Courts were in the habit of examining bills of exceptions as if incorporated in the *postea*; this practice was not confined to Ireland, it existed in England also (a). Some years before the passing of 28 G. 3, c. 31, this practice was considered in the King's Bench in England not to be warranted by the Statute of Westminster, and, no doubt, the King's Bench were right. By the Statute of Westminster, it was in a Court of Error only that a bill of exceptions was examinable; and the Court out of which the *Nisi Prius* record issued, not being a Court of Error, could not, under the Statute of Westminster, examine the bill of exceptions; on it they could pronounce no judgment; and when brought before them, according to the old, irregular practice, the Court could only deal with it as part of the materials brought before them upon a motion for a new trial, and the order so made was not, and could not be, a judgment. It is curious and instructive to observe here the different procedure adopted in England and in Ireland, with respect to the anomalous practice previously in both countries upon bills of exceptions. In England, the Court of King's Bench corrected its own irregular practice; and since the correspondence between Lord Mansfield and Lord Annesley, it is only in a Court of Error that a bill of exceptions has been held to be examinable in England. It must, under the Statute of Westminster, be on the roll to be examinable; but in Ireland, a different course was pursued. The delay and expense of a writ of error upon an interlocutory proceeding, as a bill of exceptions often is, was felt to require legislative interference.

(a) Bul. N. P.

An exception is often on a single point remote from the main question in a cause—it may be upon the admission or rejection of evidence ; and it was considered better that the Court out of which the record issued should correct the errors of the Judge at Nisi Prius, by an examination of the bill of exceptions before judgment, than that the record should go to the House of Lords in order to correct that error, and then travel back to the Court below, in order to have a new trial, and then, perhaps, upon a new writ of error, go up to the House of Lords again. To remedy this grievance, the Irish statute of the 28 *G. 3*, c. 31, was passed, by which, as it seems to me, the requirement of the Statute of Westminster, that the exception should be on the roll for examination, was repealed ; and the old practice in Ireland was sanctioned by legislative authority. This was a remedial act, and peculiar to Ireland ; and this leads me to the construction of that statute, 28 *G. 3*, c. 31.

But before entering on that subject, I wish to notice the two excepted precedents relied upon by the plaintiffs in error, for the purpose of showing that the practice to which I have referred was not a uniform practice. These precedents are in the cases of *Begbie v. Clark* and *Howard v. Shaw* ; but on examination, I think it will be found that, so far from bearing evidence of the established practice, they are strong testimonies in support of it. I find, upon inquiry in the office of the Queen's Bench, that the case of *Begbie v. Clark* was heard in Michaelmas Term 1832 ; there was a verdict for the plaintiff, subject to a bill of exceptions taken by the defendant. In January 1834, the exceptions were allowed, and a *venire de novo* was ordered by the Queen's Bench. In this state of things, in order to decide the question between the parties (which was an important one, involving the merits of the case), a judgment was entered for the defendant, and a writ of error was brought by the plaintiff, and the judgment was framed by the Counsel of the parties, and by *consent*, in order to obtain the opinion of the Court of Error with as little delay and expense as possible. In this shape it was brought before the Exchequer Chamber, but no final decision was made, the parties having amicably settled the case between themselves. The other excepted case is that of *Howard v. Shaw*, which is a much

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

later case, and only differs from *Begbie v. Clark* in this respect, that the consent in *Howard v. Shaw*, to have the record made up in the new form, in order to have the question finally settled by a writ of error, was, upon an order of Burton, J., made a rule of the Court of Queen's Bench, without which the officer refused to act upon the consent of the parties. Thus, these excepted cases, founded as they are on the consent of the parties, in order to escape from the general rule of the Court, are but instances of the general maxim, *exceptio probat regulam*.

The Act of 28 G. 3 is not, I admit, a declaratory Act. It could not be such with reference to the Statute of Westminster, and to the doctrine laid down by the King's Bench in England; but it adopts the practice then existing in Ireland. The language of the preamble is strikingly in harmony with this object. It uses the terms, "it has been holden," &c., referring to the English decisions; and it proceeds to provide a remedy, and what is that? To give to the Court below a legal, statutable authority to act as it had theretofore done, notwithstanding the Statute of Westminster and the new doctrine. It repeats, by implication, so much of the Statute of Westminster as requires the exception to *be put on the roll*, that is, to be recorded, or made part of the record before examination, and enacts, that the exception shall be incorporated in the *postea*, upon which the Court may either give judgment or make order, as the case requires. Is it not plain that the object of this statute was not to provide for an immediate writ of error from an order for a *venire de novo*, but to save the delay and expense of that proceeding, by allowing the Court out of which the record issued, themselves, to consider the exceptions, and to make an order for a *venire de novo*, if necessary? The contrast, in the terms of the statute, between the words, "give judgment," or "make an order," from the construction which agrees with Irish practice, the Court may give judgment for the party who obtained the verdict, thereby overruling the exceptions, or may make an order for a *venire de novo*, if the exceptions are allowed. The construction contended for by the Bank converts this order into a judgment. If that were so, an immediate writ of error would lie; and the case of *Kennedy v. Gregg* was wrongly

decided. That case was not, however, impeached, at least in the argument below ; at all events, no writ of error was sued out upon the order for the *venire de novo*. The statute alone provides for an order to arrest the judgment. That will apply to the case of a verdict for the plaintiffs, and the declaration not containing any cause of action, such an order is made of course before judgment, and may be made where no bill of exceptions has been taken upon motion to the Court out of which the record issues. Such an order is no judgment, but being final in its character, it has been held to be the subject of a writ of error ; but the order for a *venire de novo* is not final in its character ; it supposes a further proceeding or new trial, with all its consequences.

It has, however, been urged, that the construction I am contending for is a one-sided construction, because it allows a writ of error to the party exceptant, and allows no writ of error to the party who obtained the verdict ; but the answer is obvious. The writ of error lies only after final judgment, or award in the nature of a judgment, and where the exceptions are allowed, and a new trial ordered, the proceeding is not at an end ; but where the exceptions are overruled, and the verdict is confirmed, then the judgment is final : and let it be remembered, that it was for the benefit of the exceptant that the statute was passed, according to its preamble. The power exercised by the Queen's Bench to examine the exceptions before judgment, it exercised not as a Court of Error, but as upon a motion for a new trial ; and if the statute 28 G. 3 was intended, as it appears it was, to validate the old practice, the analogy requires us to hold, that the order for a *venire de novo* under that statute, and made before judgment, is an order merely, an interlocutory proceeding never intended to be reviewed by a Court of Error. Considering, therefore, the terms of the statute and the practice of the Irish Courts together, I should say that our inquiry here should be, *not* what, in reference to the Statute of Westminster and the English doctrine, the construction of this Irish statute should in strictness be, but whether its terms are consistent with that practice ; and if this be so, who can doubt what was intended by Mr. O'Neil and the

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

eminent Irish lawyers by whom the statute was framed, and the Irish Legislature which passed it? Were they ignorant of this practice?

Now, consider what effect should be given, according to the highest authorities, to this uniform and continued practice of the Irish Court in the construction of the statute. "*Cotemporanea interpretatio est fortissima*," says Lord Coke; and here is a statute passed apparently not to create a new practice, but to validate a practice subsisting before its enactment. I shall refer only to two cases on this subject, and to the opinions of two of the most eminent Judges of modern times—I mean the case of *Galway v. Baker* (a), with Lord Cottenham's observation on this very statute, and to the case of *Guthrie v. Sterne* (b), and the language of the late Lord Chief Justice Bushe, as there reported. Lord Cottenham says (p. 162):—"The Irish Act, in some respects, alters the mode of proceeding, and gives power in matters relating to bills of exceptions; but whether it really alters the mode of proceeding, so far as to justify the course here adopted, is a question that may be somewhat doubtful. It may, on this subject, be material to inquire what has been the usual course of proceeding in Ireland, and what has, in this way, been the interpretation put by the Court on this statute." And Lord Chief Justice Bushe says:—"If it were necessary to inquire, it would not be difficult to discover the origin of this practice, in the obvious convenience of all parties, without the slightest inconvenience or injury to any. But it is not necessary for us to inquire into it. It is enough for us to say that such was the practice of the Court; and the practice of the Court is the law of the Court, and as to that Court is the law of the country; and that assertion is true, to this extent, even though that practice should be repugnant to the general principles of the Common Law, or even to the provisions of particular statutes. And that position is supported not only by express authority, but the soundest principles; because if it were otherwise, the most alarming confusion would be introduced, by disturbing adjudications which had been made according to the practice of each Court, upon an allegation that such practice was inconsistent with the law."

(a) 7 Cl. & F. 379.

(b) 1 F. & Sm. 49.

The opinion of Chief Justice Tindal, in the case of *Trimleston v. Kemmis*, has been relied on as an authoritative exposition of the statute 28 G. 3, and I admit the respect due to that opinion; and if the question now before us had arisen in that case—if it had been material for that eminent Judge to distinguish between a judgment for a *venire de novo* and a mere order for a *venire de novo*—if the practice of the Irish Courts, as bearing upon the construction of this statute, had been brought before him, I should be disposed to bow to his opinion; but for the decision of the questions submitted by the Lords to the Judges of England, these matters were unnecessary, and were not considered. I doubt not that Chief Justice Tindal, had the question arisen before him, would have attached to the practice of the Courts as much weight as Lord Cottenham did in the case of *Galway v. Baker*.

But, secondly, let me suppose that the bill of exceptions is now legitimately before us, as if it were a part of the record—I still think the judgment of the Queen's Bench should be affirmed. I think, and I thought below, that there was no evidence to go to the jury upon that first trial, of such negligence on the plaintiffs' part as could furnish a defence in law for the Bank. The only evidence relied upon by the defendants below, and that only upon which the direction of the CHIEF JUSTICE was grounded, was, *that the trustees acted negligently in confiding to Grace, their agent, the custody of their common seal*. Now, for my part, I see no culpable negligence in the trustees confiding the care of their seal to their agent Grace; and if I did, I could see no immediate connexion between that negligence, and the act of the defendants in transferring the stock of the trustees upon the forged warrants. Had the custody of the seal been in one of the trustees, and that trustee had committed the forgery, what difference could it have made? Had Grace been elected Mayor of Kilkenny, as he might have been, that would have been the case. It must be remembered, that no trust or authority for the *use of the seal* was committed to Grace; he was the mere keeper of it. In most corporations there is a seal-keeper: is the corporation to presume that their seal-keeper will commit a felony? The trustees were empowered by the statute incorporating them to

T. T. 1852.  
*Exch Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVAN'S  
 CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

make an order for the custody of their seal. Suppose, by written order they had made Grace their seal-keeper, would that afford a defence to the Bank? There is no evidence of a written order in this case; but it was not required that their order should be in writing, and there is abundant evidence that to the agent the custody of the seal was committed; and it appears that a prudent precaution was taken by the trustees for the due application of the seal. It appears to have been their practice to have the seal impressed by, or by the order, and countersigned by two of the corporation as witnesses.

But suppose the trustees were negligent in committing the custody of their seal to their own agent, I am at a loss to understand how that circumstance can form a defence for the Bank. They knew not how the seal was kept. They were not misled by any act of the trustees, either before or after the forgeries, to suppose either a prior sanction or a subsequent assent by the trustees to those forgeries, or the transfers made under them. Nothing of the kind to warrant the notion of prior consent or subsequent assent existed in the case. The forgeries were entirely unknown to the trustees; they were kept in the dark by the dividends (which under the genuine warrant of attorney Grace received) being regularly paid to them by him, as if the principal was still in Bank; and the moment they are apprised of the forgery, they inform the Bank, and prosecute the delinquent to conviction. It was, I think, a mistake to apply to such a case as this the principle of negligence. It is a strong thing to divest his property from a stock-owner, on the ground that he has been negligent about it. There must, I apprehend, be some positive act on his part to warrant an appropriation of it to another. If, indeed, as is said by the Court, in *Davis v. The Bank of England*, and adopted by Lord Denman, in *Coles v. The Bank of England*—if “the proprietor, being present, had not “underwritten the transfer, but had connived at the underwriting of “his name by another, or, being absent, had expressly requested “another to go and sign his name, the Act would not have been “complied with, yet the property would have passed from the stockholder; in such a case, indeed, fraud would have been an ingre-

"dient, but we apprehend that any *culpable conduct* by which the "relation of the parties to the property is completely altered will "have the same effect." What culpable conduct or gross negligence have the trustees been guilty of in their transactions with the Bank of Ireland, which has induced the Bank to act differently from the way in which they would otherwise have acted, or to produce an entire alteration of the relation of the parties to the property? In all the cases in which the Bank has been protected, on the ground of gross negligence in the customer, I find that the negligence relied on was negligence in the transaction with the Bank, by their knowingly doing or suffering acts to be done, which naturally led the Bank to believe that the customer was an assenting party to the payment or transfer. Mere general negligence in the customer has, in no instance, been a defence to the Bank. If I keep a bad lock, or no lock, upon my desk, and a dishonest servant gets my draft-book, and forges my name, is the Bank which pays the forged check protected? The negligence, upon the authorities, must not only be gross negligence, *crassa negligentia*, but negligence in the transaction itself. It should furnish not merely an occasion, but directly lead to the loss. If the seal had been broken, and required repair, and was left with a jeweller for that purpose, and he had committed the fraud, negligence might, with equal justice, furnish a defence to the Bank against such an action as this is. To allow such a defence to the Bank would be to presume, against the evidence, that the trustees connived at, or were privy to, the felony and fraud committed by their agent.

I think, on the whole, the judgment of the Queen's Bench should be affirmed.

TORRENS, J.

In this case, it appears to me that two important questions are submitted for our decision, as arising out of the able arguments and discussion which this case has undergone. A third question, namely that on the construction of the statute of 28 G. 3, has been much adverted to in the argument, and a few observations on that statute may be necessary, though not, in my opinion, governing the case.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

The first and preliminary question is this: whether it be competent for this Court to look into and consider all the documents which have been transmitted from the Court of Queen's Bench, under the writ of *certiorari* issued by this Court, and as forming part and parcel of the record in the suit depending between these parties?

In discussing this preliminary question, it is unnecessary to advert to the various proceedings which have characterised this case *previous* to the issuing of the writ of *certiorari*. By the return of the LORD CHIEF JUSTICE to this writ, all the proceedings, from the writ of *distringas* in the first action down to the judgment of the Court on the ruling on the bill of exceptions, are set out on the transmiss now before us, and which enables this Court to discover and adjudicate upon the legality of the charge of the late LORD CHIEF JUSTICE; that being the real and vital question at issue between the parties, viz.:—whether that charge be sustainable in point of law or not? It has been said, and argued at great length, and with great research, that the introduction upon the transmiss of all the matters returned on the *certiorari*, forming the narrative of what took place on the first trial, amounts to contradictory matter, inconsistent with the true record, on which a verdict has been had, and judgment entered. I confess I cannot see in what the contradiction or inconsistency consists; and it would be yielding to a lamentable technicality, and working manifest injustice, if the appealing party should be precluded from putting before the Court of Appeal the documents which raise the real question, and which, if not referred to, there really would be no question to decide. The parties are the same, the *lis mota* is the same; a legal issue is knit between them: and whether that legal issue ought to be determined in favour of the plaintiffs or defendants, is the question which the Court has to decide. It must, no doubt, be admitted, that the structure of this record, as was presented to this Court, is not of a very artificial form, nor constructed on the basis or forms of the precedents of the records of the Courts. But the circumstances of the case are peculiar; and in consequence of the plaintiffs in error not appearing on the second trial, and wishing to maintain what they

conceived to be a legal charge in their favour, they had no other course to take, when they did not appear, than obtaining an order from this Court to amend the transmiss; and whether it be here under the plea of alleged diminution or amendment of the record, or upon what other ground it may be here, here it is, and we must decide the legal question which the conflicting judgments of the Judges have raised. If, hereafter, this case (as from its magnitude and importance no doubt it will) go to a superior tribunal, I do not expect that this transmiss, as at present returned and before us, will receive as a pleading the approving sanction of that tribunal, occasioned by the non-appearance by the defendants below on the second trial; and upon which act of the defendants I do not wish to comment. Had they appeared, the conflicting legal issue might, on that second trial, have been put on the then single record, and the short and distinct question raised on the adverse opinions. Neither this Court nor the Court below are, however, answerable for the structure of this record; and if it have failings or deformities, it rests not on our heads.

I have said, on reference to the documents returned on the writ of *certiorari*, I see no incongruity or contradiction with the record originally transmitted. The many authorities cited by Mr. *Darley*, in his excellent argument, go to establish that this record must be examined and read in conjunction with the matters certified on the return to the *certiorari*. The case of *Phelps v. Smith*, reported in *Lilly En.*, 254, appears to me to be strongly in support of that opinion. A statement is there given of the whole of the proceedings until the final decision of the House of Lords. In that case, after errors brought in the Exchequer Chamber, and errors assigned, the Court of King's Bench amended the record, in what had been assigned for error; and after those amendments were made, the defendant in error sued out the *certiorari*, to satisfy, as it is said, the Justices and Barons that the record was not erroneous. The CHIEF JUSTICE returns the amendments in reply to the writ; and the judgment of the Court below, founded on those amendments, is affirmed in the Exchequer Chamber, and that judgment subsequently affirmed in the House of Lords. Thus, it appears that matters not

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

originally forming any part of the record, and indeed appearing to be inconsistent with it, were, after the amendments made in the Court below, transmitted by the return of the CHIEF JUSTICE to the Court of Error; and in obedience to the writ, considered by that Court as part of the transmitted record, examined and decided upon as such; and which decision was afterwards confirmed by the ultimate tribunal, the House of Lords. I am of opinion, therefore, that this decision settles the preliminary question of our competency to examine the documents transmitted in return to the writ of *certiorari*.

The second question, then, upon the whole of the record thus transmitted is:—was the charge of the learned CHIEF JUSTICE right in point of law, and should the exceptions to that charge have been allowed? Upon this question, I am of opinion that the judgment of the Court of Queen's Bench, allowing the exceptions, should be affirmed.

I need not travel into the pleadings or the evidence, which has been so much discussed, nor the right of the plaintiffs to sustain this action, and that, in point of law, the stock illegally transferred is still theirs. In the case of *Davis v. The Bank of England*, this point was settled. That was an action against the Bank, to recover the dividends payable upon stock transferred under a forged power of attorney. It was contended in that case, that the stock having been so transferred, the right to receive the dividends by the plaintiff was gone; but Chief Justice Best, in his judgment, repudiates this doctrine, and says:—"We cannot do justice to this plaintiff, unless we hold that the stock is still his;" and he there fully enters into the reasons which induce him to hold that opinion; and the reference made by my Brother PERRIN to the statute 7 & 8 Vic. fully establish that the ownership of the stock is still the plaintiffs'.

If, then, the stock, legally speaking, or its equivalent, be the property of the plaintiffs, it will be right to examine next, upon the authorities, whether the plaintiffs, by any act of theirs, either express or implied, by previous authority or subsequent adoption, have led the defendants to make the transfer of which they com-

plain : if there be either one or the other, the plaintiffs, under decided authorities, cannot recover. The language of Lord Mansfield, in *Bird v. Randall* (a), cited by Chief Justice Best, in *Davis v. The Bank of England*, is clear on this point. Lord Mansfield says:—"Whatever, in equity and conscience, according to the circumstances of the case, bars the plaintiff's right of recovery, may be given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his own case, and on that only."

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

Now, the case of the defendants is rested on the sole and single ground of negligence in the plaintiffs so keeping the seal in the custody of their agent, that he has thereby been enabled to commit the forgery, and have the stock transferred to his nominee. It is conceded, there was neither previous authority given to Grace, or a subsequent adoption of his acts by the plaintiffs, nor any one act charged against them on this important question of negligence. Does such negligence alone, therefore, supposing it to exist, so taint the justice and conscience of the plaintiffs' case, that they cannot recover? In the first place, no authority has been referred to, to establish such a position. The case coming nearest to it is *Coles v. The Bank of England*. In that case, there was gross negligence established on the part of the testatrix, in whose right the plaintiff sued; and further, the jury found, in answer to two questions submitted to them by Lord Denman, first, that the testatrix was guilty of gross negligence, having the means of knowing of the diminution of her stock by the fraudulent sale, and subsequently received the dividends on the diminished stock; secondly, that the Bank was not guilty of any negligence in making the transfers, or paying the dividends; and these questions, so propounded to the jury, directly leads to the inquiry in this case. What have been the acts of reciprocal negligence on the part of the two corporations? As to the alleged negligence on the part of the plaintiffs, it resolves itself into the sole charge of the careless custody of the seal of the corporation. There is no fraud nor connivance chargeable against the plaintiffs, nor, as

(a) 3 Burr. 1353.



T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

proved in *Coles v. The Bank of England*, any subsequent adoption of Grace's acts; and nothing, in my judgment, can be more inconsequential and illogical than the inference that, because the trustees were careless or negligent in the keeping of their corporate seal, that therefore the Bank was justified in transferring their property under a forged power. In the utterance or concoction of the forgery itself there was no neglect or default of the plaintiffs. I cannot see, that leaving the seal in Grace's custody led to the forgeries committed by him, by the several false attestations which, it appears, he annexed to the forged instruments; and unless those forgeries be the *consequence of that act*, and were *caused by it*, I do not see that there was any evidence to go to the jury to support the charge of the CHIEF JUSTICE. There can be no doubt but that, permitting the seal to remain in Grace's custody, as appears in the evidence, the plaintiffs did give him a greater facility in executing his fraudulent purposes; but the same thing might have happened, no matter in whose custody the seal was deposited. The charter of the trustees or the Act of Parliament does not specify or direct where the seal of the corporation is to be deposited. It must be confided to some one; the trustees left it in the hands of their confidential agent. It has been said it ought to have been deposited with one or more of the trustees; yet a like forgery, by the affixing false attestations to the power of attorney, might have been committed; and could it be held that in such a case the Bank would not be liable? How then can we measure the quantum of neglect which shall bar the plaintiffs, in justice and conscience, from recovering, when they have not been contributory to the loss which has occurred? When they do so contribute, they are not, as Lord Mansfield has said, entitled either "in conscience or equity to recover."

Now, on the other hand, let us examine into the second question proposed by Lord Denman, and see whether the Bank was guilty of negligence in making these transfers; and I premise the observations I shall make on that head by reading that part of the judgment of Chief Justice Best, in *Davis v. The Bank of England*, which appears to me particularly to apply to the present case, and to

which my Brother JACKSON has fully adverted. He says (2 *Bing.*, T. T. 1852. 404), "It is the duty of the Bank to prevent a transfer until they *Exch. Cham.* "are satisfied that the person who claims to be allowed to make it is *BANK OF* "duly authorised to do so. They may take reasonable time to make *IRELAND* "inquiries, and require proof that the signature to a power of *v.* "attorney is the writing of the person whose signature it purported *TRUSTEES* "to be. It is the Bank, therefore, and not the stock-holder, who is *OF EVANS'* "to suffer if, *for want of inquiry*, they are imposed upon, and allow *CHARITIES.* "a transfer to be entered in their books, and made without the proper "authority." Every word of this part of Chief Justice Best's judgment is pregnant with applicability to the present case. Now let us, then, trace the case in its facts and progress. The fund is the property of a charity incorporated by statute. It appeared that in June 1836, the plaintiffs executed a power of attorney to Grace, authorising him to receive the dividends, and the dividends only, on stock standing in the name of the trustees. The power of attorney had the seal of the corporation and the signature of two of the trustees, viz., the Mayor of Kilkenny and the Dean of Ossory, and it is expressed to be *signed, sealed*, and delivered in their presence—whether as parties or witnesses (though informal), may not be material; at all events, it was a peculiar and unusual form, certainly not complying with the requisites of the statute, although professing so to do; its *peculiarity*, in my judgment, ought to have attracted the attention of the Bank. However that may be, was there not cause for exciting the surprise and calling for the inquiry suggested by Chief Justice Best, where the first power of attorney to sell stock and not receive dividends was presented to them by Corbet, Grace being the witness to the execution of the power by the Mayor of Kilkenny alone, authorising the absolute sale of stock, the dividends of which, Grace, as the known agent of the trustees, had only been empowered previously to receive? The attestation, too, differs from the authentic power of attorney given to Grace in 1836. That power of attorney appears to have been *signed*, and so expressed in the attestation, by the two trustees, the Mayor and the Dean. The attestation is different in the forged powers; the word "signed" is omitted in them all. Ought not this variance from the previous

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

form in the genuine instrument have attracted the vigilance of the Bank, so as to institute inquiry, or make a comparison with the manner of attestation in the genuine instrument? But above all, when Grace, from being the hand to receive the dividends only, became the witness to a power of attorney to another to receive the principal; and when these powers of attorney came in such quick succession, witnessed as they were, and disposing absolutely of the funds of a charity which had hitherto sustained its exigencies for several years out of its annual dividends—was there nothing in these proceedings to put the Bank on its guard to lead them to a course of inquiry from the years 1842 to 1845 as to the regularity and authenticity of the documents under which they were acting? The evidence of the Bank clerk leads one to believe that the supposed respectability of Grace operated strongly to disarm suspicion of the authenticity of the instruments on which the transfers were made; but, in my opinion, no confidence in the respectability of individuals should dispense with those inquiries which the law has pronounced to be necessary for the protection of the public. If, therefore, the Bank, as I think it ought, has not made those inquiries, which might have prevented their being deceived, I think they must suffer the loss; and though the plaintiffs may have been careless as to the custody of their seal, yet, as that cannot be held to be negligence in the *fabrication* of the *powers* of attorney, I think the exceptions ought to be allowed.

Upon the third question, namely, the construction of 28 G. 3, if I be right in the view I have taken of the two first questions which I have discussed, it would occur to myself that whatever construction might be put on the statute would not affect the final judgment of the Court; but as this question has undergone much discussion in the argument and in our conferences, I would wish shortly to state my opinion. I quite agree with my Brothers PERRIN and CRAMPTON in their judgment as to what had been, from a remote period in this country, previous to the enactment of 28 G. 3, the practice of the Courts in Ireland, and I should hold that it has all the authenticity of a contemporaneous practice, in consequence of being uniform. In all that I fully concur; and during the progress

of the argument I felt it was not likely that opinion would be changed; for I should not like to find what had been so long established should be lightly disturbed. O'Neil's Act adopted and validated that practice, and the construction put upon it remained undisturbed, until the judgment of Chief Justice Tindal, in the case of *Trimleston v. Kemmis*. With respect to that decision, I find myself in this difficulty:—Entertaining every wish to sustain the law and practice of this country, I feel bound to attend to the ultimate decision of the superior tribunal; and I feel I have no judicial right to say whether that be right or wrong. I am not to say whether the learned Chief Justice inquired into the prevailing practice of this country; but he pronounced an opinion upon the subject in *Galway v. Baker*, and I must assume that he would not lightly have pronounced that opinion without having satisfied himself of the true construction of that statute. Suppose the construction of this statute was the single question in this case, how could this Court, in the face of that judgment, declare the construction of that statute to be different from the one given to it by the ultimate tribunal? I, therefore, however willing to come to a contrary conclusion, think the judgment of the House of Lords coercive, and that I am bound by it.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

PENNEFATHER, B.

In this case the plaintiffs in error complain that by the adjudication of the Court of Queen's Bench, in awarding a *venire de novo*, they have been aggrieved—that the verdict obtained by them had been set at nought, and that it is unjust they should not have the opportunity of examining whether their complaint be well founded or not. These allegations are met, first, by saying that nothing appears on the record amounting to error, that the facts and matters returned in answer to the writ of *certiorari* form no part of the record, and that our judgment should be given on the transmiss. Secondly, that if we were at liberty to look into the *postea* and bill of exceptions, that the judgment or order, or whatever it is to be called, directing the *venire de novo*, is a proper and just judgment.

T. T. 1852.  
*Exch. Cham.*

BANK OF  
IRELAND

v.

TRUSTEES  
OF EVANS'  
CHARITIES.

To arrive at the means of discussing the latter question, it is necessary to dispose of the first; for if we are precluded from examining the bill of exceptions, there is no question before the Court. The objection rests first on this, that it would be contrary to the transmiss, and contradictory to the continuances, and that we, therefore, are precluded from examining into it. I do not think that, ultimately, any great reliance was placed on that objection; for if the matters returned by the *certiorari* be in reality part of the record, I should say our judgment must be pronounced on the whole record; and, in truth, Counsel for the defendants in error almost conceded that proposition, and it is not much resisted by any opinion expressed by any member of the Court.

But the question whether the order—for I will call it an order—for the *venire de novo* is to be considered as part of the record, or whether, adopting the practice which, to a very great extent, has prevailed, we should so construe the statute 28 G. 3, as to give a sanction to that practice, and consider the order for the *venire de novo* not as matter of record, but that it is to be treated as an ordinary order for setting aside a verdict. It does appear, that so late as Lord Mansfield's time, it was the opinion of that Judge that the Statute of Westminster was in force in Ireland. It became the law in Ireland in the reign of Hen. 7, and from that period the proceedings under it should have been the same as in England; and if any practice in either country grew up contrary to that statute, it must be considered how far such a practice ought to control the statute law of the land, and how far we are to make an interpretation different in Ireland from what it is in England; whether any practice can put a construction upon a statute, and say that it should receive one view in Ireland, and another in England? That this could not be done is shown both on principle and authority. In *Gray's case* peremptory challenges had been allowed; but the House of Lords determined that that practice could not sustain a different interpretation as to what the Common Law was in Ireland from what it was in England.

Can, then, a practice, if it cannot change the Common Law, can it change the Statute Law, and make it different in Ireland from what

it has confessedly been in England? The practice ought to receive much consideration. It has not always been sanctioned, nor does it appear the Courts were aware of what it was; that statute, 28 G. 3, reciting a mischief which it was intended to have remedied, does *not* advert to orders made contrary to the Statute of Westminster, and has received the sanction of the Legislature. The 28 G. 3 appears to me to leave untouched the Statute of Westminster, save only that a bill of exceptions should be signed without being sealed, and should be examined in the inferior Court out of which it issues. The statute of 28 G. 3 says that the Court is to examine the bill of exceptions, and give judgment thereon. It has been argued that the only judgment to be given is one overruling the bill of exceptions, and affirming the verdict of the Court below, for that any thing going contrary to the bill of exceptions can only be an order; so that when the statute says that the Court shall give judgment thereon, the interpretation to be put on it is, that they shall only give judgment one way, and any thing else is but an order not appearing on the record. I see no reason whatever to say that the pronouncing an order for a *venire de novo* should be different from an order arresting the judgment. It is admitted that an order for arresting the judgment under that statute is one from which a writ of error will lie; and why should there a different construction be put on an order which awards a *venire de novo*, and that which arrests the judgment? It would appear to me the word "order" must be treated as synonymous to judgment; and if it be a judgment in the one case, it is equally so in the other. It occurs to me that the statute did not intend to sanction the practice, which must be considered as vicious, making the law different in Ireland from what it was in England, and if the Legislature intended to make such a law, altering the practice, they would have done so by express words. But then, it is said, they intended to shorten the proceedings, and diminish the expense. No doubt, they contemplated saving of expense; but not the depriving a party of the right which existed under a previous statute, and which still exists; and I would say the construction sought to be put on the statute tends to litigation; for if there be no appeal, no writ of error from an

T. T. 1862.

*Exch. Cham.*BANK OF  
IRELAND

v.

TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

award of a *venire de novo*, a second trial is unavoidable, the parties must appear on that second trial, and will be thereby involved in the expense of that second trial, and the litigation consequent thereon: so far from shortening the expense, it would appear to be greatly lengthening it. Here the plaintiffs in error obtained a verdict; the Court of Queen's Bench set aside that verdict; they, plaintiffs, say they are entitled to hold that verdict, and are not bound to abandon that they have legally obtained, and run the chance of how another jury may consider this case. They have a right to rely on the finding of that jury. Upon obtaining that verdict they have a right to rely upon it, if the law allows them so to do; and if that be matter of record, then, by the Statute of Westminster, they have a right to have that examined; and it therefore does appear to me that this practice never was intended to be sanctioned by the Legislature, and that this order must be considered as a judgment and a matter of record. By being incorporated in the *postea* it becomes part of the record; and although the statute does not say it should be entered on the roll of the judgment, it leaves it as it found it, without making any alteration.

This, then, being matter of record, we are bound, when all is returned to us, to look into the record, and if we find that there has been a verdict obtained by a party, and that this verdict has not been properly set aside, then the subsequent trial and finding thereon was *coram non Judice*; therefore, it appears to me that the question to be discussed is, does the order form part of the record? If so, we are bound to give our judgment on it. I must add, that I cannot altogether discard the case which, although upon consent, shows, at least, a disposition to get rid of that practice which was felt to be inconvenient and unjust; and although, at all times, reciprocity is not to receive favour, yet there is no reason why one party should have his right, and not the other. This decision has led to two trials and a variety of contested motions; whereas if a writ of error had been brought before us on the first judgment, the case would not have occupied so much unnecessary time.

But it is said that this is an interlocutory order. I do not think so. It is not like an interlocutory judgment in assumpsit, that the plaintiffs should recover on an account stated on a contract; there is nothing determined as to the rights of the parties but this award, setting aside the verdict obtained on a matter, the ascertaining the existence of which had settled the difference between the parties; it does not, therefore, appear to me interlocutory, within the meaning of that case, which says, that a writ of error does not lie on such a judgment. We, therefore, are bound to consider the exceptions.

With regard to the rulings of the CHIEF JUSTICE, I think the judgments of my Brothers PERRIN and CRAMPTON, in the Court below, right and proper, and that their award of a *venire de novo* was correct. I do not think it necessary to go at length into the question; I would refer to the reasons given by the Judges who have preceded me, merely saying that it does not appear to me there was any act which could be considered as misconduct or negligence, save leaving the seal generally in the custody of the agent: that was not done with regard to any particular transaction. They neither sanctioned or concurred in the using the seal. There was no evidence sufficient to excuse or sanction the Bank in acting on these powers of attorney, and thereby deprive the plaintiffs of their legal vested rights.

I do not go into the question, whether the Bank took the necessary steps or used necessary precautions. The jury found they were not guilty of negligence, and no exception has been taken; there is nothing, therefore, to authorise us in investigating that matter. We must presume they were not guilty of negligence: perhaps that finding was the reason for their adopting the course they have done, why they persisted in every effort to maintain their verdict, thinking, perhaps, that another jury might not come to the same conclusion, and that it was better to retain what they had got, and put the issue on this, that what had been done in the Court of Queen's Bench in awarding a *venire de novo* was wrong. Upon these grounds, I am of opinion that the judgment of the Court below ought to be affirmed.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.



T. T. 1852.

*Exch. Cham.*BANK OF  
IRELAND

v.

TRUSTEES  
OF EVANS'  
CHARITIES.

Pigot, C. B.

In this case two very important questions are raised for the consideration of this Court. I shall first apply myself to that on the form of the record. On this question, I am of opinion, we are entitled to examine all the proceedings as returned to us on the writ of *certiorari*, and to treat them as part of the record.

Let us first see what is the record as originally transmitted: it is an award, in the ordinary terms, awarding *venire de novo*. The statement is, that the Sheriff should empanel a jury, in pursuance of a writ directed to him, and upon that writ there should be a new trial, and then there are entries of continuances until the last trial had. That is one line of proceeding. We have then a new *venire* in the case, and a plea depending between these parties. In truth there were two *venires*, a *venire* on which continuances were entered, and a *venire* on which the trial was had, issued by the Court at one and the same time; two writs of *venire* on the same pleas pending between the same parties, and two lines of proceeding leading to two distinct trials, or two distinct proceedings. All this is absurd, unjust, and inconsistent with the ordinary proceedings of Courts of Law. But if we are forced to give effect to the record of continuances, and at the same time to give effect, as we are bound to do, to the certificate and *certiorari*, we are bound to hold, of necessity, that these two lines of proceedings did take place. If these proceedings did take place, what must be the result? Why, a mass of error greater than any indicated in the course of the argument. We would have this strange proceeding of a Court of Law—first, there would be a *venire*, on which there was a trial and exceptions taken, and on which there was a judgment, and we would have the Court keeping back this *venire*, and subsequently issuing the same *venire* for the second trial. That view of the cases gives full force to the technical argument arising upon the incontrovertible variety (which is the language of some of the books) of these entrances of continuances. In that view we are at perfect liberty, and as I conceive bound, to deal with this record, and to treat the whole document as constituting the record. We must hold that there was an award of a *venire* on a bill of exceptions tendered to the charge

of the Judge on a trial had in this case ; and if we are at liberty to deal with the award of the *venire* at all, and at liberty to exercise the ordinary power of an Appellate Court, we have materials for judgment founded on this *venire*.

With regard to the other question, as to whether we are to deal with this Act of Parliament as giving the Court the power of examining the award of *venire*, I have nothing to add, save this—supposing it was not the construction of the Act of Parliament, supposing a writ of error did not lie, supposing it was necessary to await the final judgment of the Court given here ; if a writ of error lies after judgment, if we are right in holding that we can examine the nature of the proceeding, we are entitled to review this judgment. A good deal was argued, both at the Bar and on the Bench, upon a topic which has been dealt with under the name of reciprocity, with regard to the practice under this Act. What is the condition on which this practice is to be upheld ? If we are not able to review it now, or if it be not reviewed by Act of Parliament, what is the condition in which parties are placed ? Baron PENNEFATHER suggested some inconsistencies between the wording of the Act and the object stated in the preamble. The object was to shorten litigation and to diminish expense. What will be the result ? Why this :—a plaintiff brings his action, as in the present instance, against the Bank, for the omission to deliver £9000 ; he gets a verdict ; exceptions are taken to the charge on which the verdict was had, and the exceptions are allowed ; there is an award of a *venire de novo* ; he is unable to take this question to the Court of Error. A second trial is had ; the Judge allows what is ruled by the Court ; the plaintiff then takes exceptions, and the exceptions come again to the Court, and are argued ; the Court decides against them, and there is a judgment against the plaintiff ; he brings a writ of error, goes into the Court of Error, and succeeds. It is established by the judgment of the Appellate Court that the Court below was wrong. What is the result ? He never can obtain justice without a third trial. It appears to me that if we can give the statute the other construction, which will avoid a result so monstrous, we ought to do it. If that be the state of

T. T. 1852.  
Esch. Cham.  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

things which has prevailed, and which has been established now by *Kennedy v. Gregg*, I trust some means will be taken to wipe out such a blot on jurisprudence, and that the suitors in this country will not be left to such a proceeding.

I shall now proceed to the questions on the bill of exceptions. It appears to me that the two questions upon which our judgment ought to depend are, first, whether, if the transfers under the forged powers were occasioned by the neglect or default of the plaintiffs below, and not in any degree by that of the defendants, such neglect or default would be a defence to the action? Secondly, whether there was any evidence of such neglect or default given on the trial, which might have been submitted to the jury?

As I understand the direction of the Lord CHIEF JUSTICE to the jury, it was in effect this:—that if the neglect or default of the defendants contributed, in any degree, to the imposition and fraud practised upon the defendants by the use of the forged powers of attorney, the defendants were liable; but that if the success of that imposition and fraud was caused by the neglect and default of the plaintiffs only, then the defendants were not liable in this action.

This raises the abstract question, whether the Bank were liable to the loss of stock transferred by forged powers, where the forgery arises solely from the neglect or default of the owners of the stock? in other words, whether they are, by law, insurers of the safety of stock against the neglect and default of the owners? I am not aware of any decided case which establishes the affirmative of that proposition; I think it is opposed to decided authority, and I know of no principle of law which supports it. The only authority which has been much relied on to sustain it at the Bar is that of *Davis v. The Bank of England* (a). Several passages of the judgment of Lord Chief Justice Best have been cited, to show that the Bank must, in all events, be liable after a transfer under a forged power, because such a transfer works no change of property, and the Bank therefore remains liable to the original owner; but the language of the Court ought to be considered in reference to the subject matter of the judgment; and in the case of *Davis v.*

(a) 2 Bing. 393.

*The Bank of England*, no question was raised, nor was any evidence given, of any neglect or default in the plaintiffs prior to the transfers under the forged powers. The point decided was, that the Bank were liable for the stock, although a transfer was made of it under a forged power; and that the plaintiff was not disentitled to recover for dividends which had not been paid to the transferee, when the plaintiff gave notice of the forgery to the Bank, by a delay in the giving of that notice, and by an omission to take prompt proceedings to bring the perpetrator of the forgery to justice. There was no ground whatever for imputing to the plaintiff any neglect or default which, in any manner, led to the forgery, or caused any facilities for its perpetration; but it appears to me that the case furnishes, in the judgment of the Court, very strong authority for holding that neglect or default in the plaintiff, occasioning the loss of which he complained, would have constituted a defence to such an action. The language of Lord Chief Justice Best, as to this part of the case, is important:—"It has been truly said that the plaintiff could in this case only seek to recover such dividends as he had required the Bank to pay him, and which they, having been so required, had refused to pay, and that the dividends demanded were those which became due on the long annuities on the 5th of April 1820, and those on the consols, which became due in July in the same year—these dividends, as it is insisted that the plaintiff is barred from recovering, because the Bank (the plaintiff not having given them information of the forgeries) may have paid them to other persons. We agree with the Counsel for the Bank, that if it appeared the Bank had paid these dividends to persons to whom, if the plaintiff had informed them of the forgeries (as he ought to have done on the 5th of March 1820), they would have refused to pay them, he cannot recover such dividends in this action. We say, in the language of Lord Mansfield, in *Bird v. Randal* (a)—'That whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may be given in evidence by the defendants, because

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

(a) 2 Bing. 409.

T. T. 1852. *Exch. Cham.* “the plaintiff must recover upon the justice and conscience of his own case, and on that only;’ but we say that it does not appear on this case that any thing was given in evidence by the defendants that did, in equity and conscience, bar the plaintiff. It is not enough for the defendants to say they might have paid these dividends to other persons; to defend the action, on the principle laid down by Lord Mansfield, they must prove that they have paid them to persons to whom they would have refused to pay them had they been informed of the forgeries. No evidence of any such payment appears on the case.” It is plain that the Court did not, in this part of their judgment, hold the plaintiff entitled to treat the stock as if it still continued his, unaffected by the transfers made under the forged authority: on the contrary, the Lord Chief Justice expressly declared that the plaintiff would not be entitled to receive dividends which, by reason of his neglect and default in not giving early notice to the Bank, the Bank had paid to the transferees claiming under the impeached transfers. *Coles v. The Bank of England* appears to me to be an express authority to the same effect.—[States case.]—A clear and direct authority for holding that neglect or default of the plaintiffs, occasioning the loss of the stock, without neglect or default of the defendants, is a defence in such an action as this. If we consider the character which the Bank fill in reference to the stock, and the nature of their duties, the allowing of such a defence appears to me as consistent with the principles of law, as, I think, it is required by the plainest dictates of justice. The Bank are, to use the language of Vice-Chancellor Shadwell, in *Sloman v. The Bank of England* (a), “parliamentary bookkeepers” of the stock. Lord Chief Justice Best treats them as filling the character of bailees. “The Bank (he says) stand in the situation of the carrier and innkeeper.” Lord Denman, in *Coles v. The Bank of England*, treats their responsibility as “in nowise different from the Common Law liability of the banker to pay the money which he keeps from his customer, when some stranger, by a forgery, has abstracted the amount from his possession.” They are, in truth, parliamentary bailees of the stock, with the obligation

imposed upon them, for profit, of preserving the books which constitute the muniment of the owners' title; and of seeing that all transfers are made in accordance with the enactments of the Legislature. There is nothing that I can find in any of the enactments of the statutes, the language, the purpose of which requires that the owner of stock shall be exempted from the risk which, I apprehend, attaches to all other kinds of property held by one person as a bailee for another, namely, that the bailee shall not be answerable to the owner for loss occasioned by the default and misconduct of the owner. The action on the case against the bailee is (as here against the Bank) founded on a breach of duty. The Bank, as parliamentary bailees or depositories, owe to the owner of stock the duty of preserving in safety the stock and its muniments, and of concurring in the transfer of it only at the instance of the owner, or of some one invested by him with lawful authority. If the Bank be not discharged from that duty by some lawful cause, they continue answerable, although they may be misled by a forged power of attorney purporting to be executed by the owner; but the owner owes, as every bailor owes to his bailee, a correlative duty. It is his duty not so to act, as by his culpable neglect to occasion the deception by which the Bank are misled; and if he violates his duty in that respect, he discharges, so far as he is concerned, the Bank.

This is, I apprehend, the plain and clear principle of law, founded on good sense, good faith, and justice, which regulates the relation between the bailor and the bailee. I shall advert to one instance in which the principle was strikingly illustrated: A common carrier is, irrespective of special agreement or special misconduct of the person employing him, an insurer, by the common law, against all injuries save those resulting from the act of God or the King's enemies. In *Bradley v. Waterhouse* (a), the plaintiff sent a box with money by the defendant's coach; it was stolen by the defendant's servant while the coach was left in the street of Leicester for half an hour, without anybody to take care of it; Lord Tenterden was of opinion that the circumstances under which it was stolen rendered the defendant *prima facie* answerable, notwithstanding a notice by

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

(a) M. & M. 154.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

which he declared he would not be answerable for money or articles of value exceeding £5. It was, however, proved, that the plaintiff knew that the coach was left exposed in the way that I have stated, and that he had been cautioned against sending valuable parcels without adequate provision for their security. In this instance the parcel contained 200 sovereigns, and they were inclosed in six pounds of tea. Lord Tenterden, in summing up to the jury, said, "The parcel was stolen by a servant of the defendant's, who would, in any case, have had access to it, and therefore the theft was no consequence of the negligence. Still, carriers are generally answerable for the honesty of their servants. If, however, the plaintiff's own conduct, in full knowledge of the circumstances, was such as to lead to the loss—if he afforded undue temptation and facility to the crime of the servant, he can maintain no action for a loss in this manner occasioned by his own fault. It will be for you to consider whether this is not the case in the present instance. He adopts a disguise for his parcel, likely to prevent the defendant from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being likely to be selected for depredation by a dishonest servant. If you are of opinion that the loss was the consequence of the means which he adopted, and that these means were such in their nature as not to give due information or protection to the defendant, I think he cannot maintain this action; if you think otherwise, he is entitled to your verdict."

An innkeeper is by law responsible for the safety of the goods of his guest; he is *prima facie* answerable for them without any specific proof of negligence; but he may discharge himself from his responsibility by showing that the goods were lost by neglect or misconduct of the owner: *Calye's case* (a). "But if the guest's servant, or he who comes with him, steals or carries away the goods, the innkeeper shall not be charged, for then the fault is in the guest to have such a companion or servant; and the words of the writ (that is, the writ that lies against the hostler) are, *pro defectu hospitatorum seu servientium suorum*." Lord Coke here puts the exemption from liability partly upon the personal misconduct of the

(a) 8 Coke, 33 a.

guest, and partly upon the event which that misconduct caused, "being without the liability of the innkeeper, because it was so caused." Again, he says, "The innkeeper requires his guest that he will put his goods in such a chamber, under lock and key, and then he will warrant them, otherwise not. The guest lets them lie in an outer court, where they are taken away; the innkeeper shall not be charged, for the fault is in the guest, as it is held in *Dyer*, p. 266." And that this exemption arises from the personal default of the guest, appears from the other proposition laid down in the same case:—"It is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he was lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest then in safety; and therewith agrees 22 *Hen.* 6, 21; 11 *Hen.* 4, 45, *a, b*; 42 *Edw.* 3, 11 *a.*" The discharge of the responsibility of this class of bailees by the personal default of the party trusting them is illustrated in a modern case, in which the rule in Calve's case was applied—*Burgess v. Clements (a)*. The marginal note states the substance of the decision:—"An innkeeper is not answerable for the goods of his guest which are lost, through the negligence of the guest, out of a private room chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who, at the same time, told the guest that there was a key, and that he might lock the door, which he neglected to do." Lord Ellenborough rests exemption upon two grounds: first, that the plaintiff had taken upon himself the care of the goods; secondly, that by his own conduct he induced the loss. Lord Ellenborough, in adverting to the misconduct of the plaintiff, says (p. 311), "Besides, after the circumstance relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, in whatever room he might be, to use at least ordinary diligence, and particularly so as he was occupying a chamber for a special purpose; for, in general, though a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care." And Bayly, J., says (p. 314), "This,

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

(a) M. & Sel. 306.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

"then, is the case of a person at an inn, who requests a chamber for a special purpose, which request is granted, upon a condition to which he must be taken to have assented: he removes into the room with his property, which he has taken under his own custody, and afterwards leaves the room unprotected, and without making any communication to the innkeeper which might have put him on his guard as to the protection of it. To hold, in such a case, that the defendant is liable, would be to make him liable, not for his own negligence, but for the negligence of his guest—for grosser negligence can hardly be stated; and it would be to enable the plaintiff to take advantage of his own negligence, which has been the sole cause of the loss." The latter part of this judgment is expressed in terms almost identical with the charge of the LORD CHIEF JUSTICE at the trial of the case now before us.

I have referred to these authorities, not because of any resemblance of the circumstances of them to the present case, but because they illustrate the manner in which the default of the owner of the property lost discharges from their liability two classes of bailees, on whom the law casts peculiar responsibilities, and who are, by Lord Chief Justice Best, in his judgment in *Davis v. The Bank of England*, treated as having duties and liabilities similar to those under which the Bank are placed towards the owners of stock. The case of *Young v. Grote* (a), to which I shall presently advert more particularly, shows how a similar exemption is caused by the default of the customer of a private banker.

On the whole, then, it appears to me—and I should, if it had not been so much controverted, entertain that opinion without any doubt—that neglect or default of the plaintiffs in the present case, creating the means by which the forgery was effected, without any default or neglect of the Bank, would excuse them from liability for the loss of the stock transferred by means of the forgery.

The next question is, whether, in the present case, any evidence was given on the trial, of neglect or default of the plaintiffs, upon which the jury ought to have been directed to consider whether such neglect or default occasioned the transfers under forged powers?

(a) 4 Bing. 253.

I have considered, with the attention which was due to them, the observations which have been made upon the terms in which the direction of the LORD CHIEF JUSTICE to the jury was conveyed. I am not disposed to scan, very narrowly, the words which are used, either in the summing up of a Judge, or in exceptions to his charge, as these appear upon the record of a bill of exceptions. In the ordinary course of business at Nisi Prius, language is used without study or meditation; and if, from the subject-matter and the entire context, there can be given to the words a plain and intelligible meaning which will support the charge, in a matter not pointed out as the subject of exception, I should be disposed to give that meaning to the language employed, although, by dissecting and collating several particular phrases it might properly be susceptible of another. To me it appears that the language in which the directions to the jury were conveyed, as shown upon the record, is clear and unambiguous. I think the two directions which the charge of the learned Judge conveyed to them, especially when the first is read as expounded by the second, meant this, and nothing else—that the jury should find for the plaintiffs, if the neglect or default of the defendants in examining the powers of attorney in any measure contributed to the imposition which occasioned the loss; and that they should find for the defendants only in the event of their believing that the imposition was occasioned by their own neglect or default, without any neglect or default of the defendants.

Was there, then, any evidence of such neglect or default? In my opinion there was. The question is not, whether there was evidence which, in our opinion, proved and established such neglect; the question is, whether any evidence, however slight, was given of it, which was proper for the consideration of a jury. Much of the discussion which has taken place on this subject would be perfectly apposite if applied to induce a Court, upon a new trial motion, to set aside the verdict as against the weight of evidence, but it appears to me to be wholly inapplicable to the points to be determined upon the bill of exceptions. To justify us in overturning the verdict founded on the direction of the learned Judge, and in sustaining the exceptions, we ought to be satisfied that there was no

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

evidence whatever of any such neglect or default of the plaintiffs as I have described, which ought to have been submitted to the jury. Now, it appears to me that the manner in which that seal (which was the instrument by means of which the forgery was effected, the defendants were deceived, and the transfers were procured to be made in the books of the Bank) was dealt with by the plaintiffs at the respective times when the seal was affixed and used, was evidence proper to be submitted to the jury upon the question. Was that use of the seal occasioned by the plaintiffs' neglect or default? Neglect or default in such a matter as this must be relative. It must depend partly upon the duty of the trustees, partly upon the duty of Grace, the agent, partly upon the personal character of the agent; upon all the circumstances showing the position in which he and the trustees stood towards each other. If Grace had been a man of established character, of great wealth, and of high personal honour, and if he had given security for his good conduct to the trustees in a sum of £20,000, it might be that a jury ought to hold that there would have been no neglect or default whatever in entrusting him with the custody of the seal. If Grace had been, to the knowledge of the trustees, a pauper, of infamous character in his own neighbourhood, and of debauched, dishonest habits—if, for instance, he had been guilty, on some former occasion, of forgery, could it be contended that there was no neglect or default in committing the seal to his custody? If, in this extreme case, it could not (as I presume it could not) be denied that to repose such a trust in Grace would have been highly culpable default, I do not see how it can be successfully contended that proof of the position and circumstances of Grace and his connexion with the trustees, and with the seal, was not evidence proper to be submitted for the consideration of the jury, with a view to determine whether that position and these circumstances did or did not warrant that trust. All the degrees of security and insecurity, from perfect safety to extreme risk, were, in my opinion, matter for the consideration of the jury, upon the question whether there was, or was not, neglect or default in the plaintiffs in reference to the custody and use of their seal?

Upon the facts as proved, I think there was abundant room for

consideration and scrutiny of the plaintiffs' conduct. They were trustees of a very considerable fund, invested in stock. They all resided at a distance from Dublin. It was necessary, both for obtaining dividends and for transferring stock, that a power of attorney should be executed; they did execute a power of attorney under their common seal to receive dividends. In the Act of Parliament, prescribing the manner of executing and attesting the power of attorney, there is no provision for the execution or attestation of powers of attorney given by corporations. This was conceded in the argument. The statute requires signature, a corporation act, not by signature but by seal. All those circumstances might and ought to have suggested to them that the seal of the corporation might be used for authorising transfers, as it was for authorising the receipt of dividends, and might be used for the purpose of forgery. The trustees are not to be presumed to be ignorant of the casualties to which stock in the public funds are exposed by the dishonest dealings of agents. They are not to be presumed ignorant of the motive and use of a corporate seal, and of the authority which it confers on documents to which it is attached; and their neglect or care must be judged of, and ought to be considered, by a jury, with reference to the ordinary casualties and temptations which accrue in the transactions and conduct of mankind. If it was necessary or convenient that the seal should be placed in the custody of a servant, an easy mode might have been adopted to prevent the improper use of it for the abstraction of stock. The plaintiffs might have arranged with the Bank that no credit should be given to any document bearing their corporate seal, unless countersigned by certain members of the corporation, and duly attested; or that no such credit should be given without communicating with the trustees, or some of them: that some such arrangement as this, not merely was possible and easy, but would have been, in all probability, perfectly effectual as a safeguard against fraud. Again, they might have avoided placing the seal in the custody of Grace at all. I see no absurdity (and I have reason to believe it is not unusual) in the practice of keeping the corporate seal in the custody of the trustees themselves, or some of their body; secondly, if that were deemed

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

fitting, by more than one lock, with separate keys, in the custody of several members. Various contrivances might be suggested for the custody of the seal; various modes might be prescribed for the use of it, by which protection could be provided against fraud. And I apprehend that it was partly to insure such protection that the clause was introduced into the Act of Parliament, incorporating the trustees, which contemplates that they should make, by specific orders, arrangement for the use of the common seal. The omission to make any such provision was, in itself, an omission not to be altogether disregarded, in considering their conduct in reference to the seal. Let me suggest this case:—Suppose the trustees, before Grace had used the first of the forged powers of attorney, had discovered his designs, and detected his meditated fraud; suppose they had dismissed him and appointed another agent, and had then committed the seal to that agent, exactly in the same manner as they had before committed it to Grace, without further precaution as to its use or custody, would that have been neglect? If it would, in what respect would it have differed from the former conduct, save in continuing a course of unwise confidence in their agent, after having had experience of the risk, which they might have anticipated before. That there is a great difference is plain, but it is a difference in degree; and if there was that, in their confidence in Grace, which was in any degree imprudent, with a view to the use of the seal, it was a fit matter for the consideration of the jury.

It appears to me, that the very fact that there were in this case forgeries extending over a period of several years, during which there were several changes of some trustees, while others continued to act, constitutes in itself a distinct ground for imputing some neglect or default to the plaintiffs, and that in two ways—first, that such a body should, by means of their common seal, be for a series of years the subject of this spoliation, furnishes some reason for inferring that it would not have happened if the care of prudent owners had been applied to their concerns; secondly, these repeated forgeries show that there is that in the notion of a common seal, and the use which can be made of

it, which requires peculiar care in providing for its use and custody— a plain and obvious truth, which all know who are conversant with such matters—but the proof of which was inherent in the very transaction that comprised the case which was before the jury, and in itself applied the test of actual experience in illustrating what was that risk which the trustees were for years incurring, and what was the kind of care which ought to have been applied to avoid it. But there was, in the proof of what passed in their own body, evidence that suspicions were raised in a manner which could have indicated to careful and prudent persons the propriety of inquiry, at a time when inquiry must have led to the discovery of some of the frauds, and the prevention of others. Dean Vignoles says, “he did not mean to say that that was the first time his attention was called to Grace’s conduct generally, as on a former occasion he was warned concerning him, in a conversation, and that what he heard led him to inquire whether the moneys had ever been placed in the Bank to the credit of the trustees; that he made inquiries as to that, and having heard that it had been so placed, he was satisfied that it remained there; that might have been a year and a-half previous.” And Mr. Smithwick states, “that he was mayor before Mr. Hackett, and commenced his mayoralty in the winter of 1843; he attended only one meeting during his time; that was about the latter part of the month of October. He recollected having called for an account of the receipts of the funds, and on that occasion he observed a receipt for interest on £9000. He called the Dean aside, and told him he thought it necessary that the trustees should be satisfied the principal was secured, as well as the interest paid. That he had no reason to suspect any thing on the occasion as regarded that particular item. That he had a general impression that there was mismanagement, but could not say that it was by Grace, and could not say by whom it was. That he again communicated with the Dean, a few days afterwards; but that during his year of office he urged the necessity of making inquiries, and the Dean told him he would do so; that he again pressed the Dean, and he said that he might rest satisfied the stock

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS’  
 CHARITIES.

T. T. 1852. "or part of it was secure, or something to that effect ; and that was  
*Esch. Cham.* "all the communication he had during his year of office. He did  
 BANK OF "not at that time know of any thing being done with a view to the  
 IRELAND "ascertainment of how the funds were circumstanced ; he never  
 v. "went or sent to the Bank."  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

I cannot close my observations upon this part of the case without adverting to the resemblance which, in several respects, it bears in its circumstances to that of *Young v. Grote*. In that case, the neglect or default of the plaintiff was, in so dealing, through himself and his wife, with the signature to the cheque, as to facilitate the forgery. The signature affixed to the cheque, as filled by the wife, was so affixed ; and the cheque was delivered for a specific purpose, namely to procure a certain sum of money, and no more. It was put into the dominion of one who used it for another purpose, namely to obtain a large amount by effecting a forgery. How was the purpose of that forgery effected ? By using the signature as the voucher of the authenticity of the cheque. How was the purpose of the forgery effected here ? By using the seal as the voucher of the authenticity of the power of attorney. The individual acts by his signature ; the corporation act by their seal ; the signature deceives the banker ; the seal deceives the Bank. The signature was so used as to cause the loss by reason of the possession of it given to the forger, the plaintiff's clerk, in *Young v. Grote* ; the seal was so used as to cause the loss, by means of the possession of it given to the forger Grace, in the case now before us. If it be neglect or default to give the means of forgery by the custody of the signature, as in the case of *Young v. Grote*, I find it impossible to come to the conclusion that there is no evidence of neglect or default in the proof that the means of forgery were given by the custody of the seal, in the case with which we are now dealing.

It is said that negligence, to constitute a defence to such an action as this, must be negligence in the act or transaction complained of ; and that in the transaction of the transfer the plaintiffs did not participate, and consequently were not guilty of negligence in that transaction. To consider what links in the chain of causation, by which a result is produced, and so con-

nected with the result as to form a part of the transaction which comprises it, is rather the province of metaphysics than of law. Nothing can be more vague than the term "transaction," as it has been applied in this argument. It may mean the particular act of transferring the stock; it may mean the leaving of the seal in the custody of Grace; the bringing of the sealed power of attorney to the Bank; the use of the seal by Grace in tendering it there; the inspection of the seal by the officers of the Bank; the deception practised upon them, and the consequent transfer. It may be extended to signify the whole course of that dealing between the trustees and Grace, and Grace and the Bank, which constituted, on the part of the trustees, negligence in entrusting the seal with their servant; and on the part of the Bank, continued or repeated deception, caused in each case by that confidence. To say that the act of the transfer, or the act of the delivery of the sealed power to the Bank, is to be treated as an isolated transaction, and to argue that in that transaction there must be negligence, to constitute a defence, and that although it may have been directly caused by negligence, yet, as the negligence was not in that transaction, no defence arises, appears to me to be a course of reasoning not warranted by authority, by principle, or by any legal analogies. It is directly opposed by the decision in *Young v. Grote*. There, the piece of paper on which the cheque was written caused no mischief until it was used by the clerk; the husband did not get the money upon it; the wife did not get the money upon it; the act of the clerk, in writing the additional word or figure, and in getting the money, which was the fruit of the forgery, was wholly without any participation, either of the wife or the husband. Here the power of attorney, and the seal which was affixed to it, were as innocent as the cheque in *Young v. Grote*, until it was used by Grace; but in *Young v. Grote*, the forgery could never have been committed if the cheque had not been so delivered as to confer upon the clerk the power of effecting the forgery by a stroke of his pen; and in the case now before us, the forgery could not have been committed if the seal had not been so left in the custody

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.



T. T. 1852. of Grace as to confer on him the power of effecting the forgery  
*Esch. Cham.* by a fraudulent use of the seal.  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

On the whole, then, I am of opinion that the question upon the exceptions to the charge of the learned Judge at the first trial is open to us upon this writ of error, upon the allegation of diminution, and upon the documents now before us in the transcript, the return to the *certiorari*, and the documents transmitted with it; that the exceptions ought to have been overruled; that the first verdict ought to stand, and that judgment ought to have been given for the defendants upon it; that the judgment for the plaintiffs below ought to be reversed, and that the judgment which the Court below ought to have given should be now given by this Court, namely, judgment for the plaintiffs in error, who were the defendants below.

MONAHAN, C. J.

Before we consider the propriety of the rule made by the Court of Queen's Bench on the exceptions, it is absolutely necessary we should consider whether, in point of fact, we are by law authorised at all to look into them. I do not think this is a case in which we can avoid, in the first place, deciding whether the bill of exceptions constitute a part of the record; I shall therefore state the grounds which, after a good deal of consideration, and some doubt, satisfy me that we have not only a right, but are bound, to consider the rulings on these exceptions.

The plaintiffs in error resist the right of the Court to consider these exceptions, on two grounds:—First, they say we have a complete record, containing a complete series of proceedings, from the commencement of the action to the final judgment; and that we should pay no attention to that portion of the proceedings which has been sent up to this Court on the writ of *certiorari*. I cannot accede to that argument. We have certainly that which, if alone, would appear to be a complete record; we have the declaration, the plea, the award of a *venire*, and continuances from time to time, until the matter is disposed of by final judgment. So far, the transcript would appear to embrace all the proceedings; but this Court,

having issued a writ of *certiorari*, and we, having these other proceedings in the cause returned to us, in pursuance of that writ, we must look to such portions of them as, in our opinion, ought to constitute the record, and to deal with the case, not as if every thing returned was necessarily upon the record, because it has been so returned; but, in my opinion, we must treat, as on the record, such portions as ought to appear thereon. I think it would by no means tend to inspire respect to the administration of justice, if we were to allow these continuances, which the Legislature have declared, and we know to be, mere fictions, to stand in the way of the justice of the case. But before we look to these proceedings, we must come to the conclusion that they ought to constitute a part of the record, that they ought to have been included in it. The principal matters comprised therein are, the proceedings on the first trial, the bill of exceptions, and the rulings thereon.

The first question then is, ought they to constitute a portion of the record? It appears to me, independent of usage and contemporaneous construction, we ought on that question to be governed by the true construction of the statute regulating bills of exception; that is the statute 13 *Edw. 1*, c. 31, which is common to both countries; for although, at the time of its enactment, it applied only to England, yet by Poyning's Act, its provisions were extended to this country. That statute enacts, "When one is impleaded before any of the Justices doth allege exception, praying that the Justices will allow it, which, if they will not allow, if he that allege do write the exceptions, and pray that the Justices may put their seals to it for a testimony, the Justices shall put their seals; and if one will not, another shall; and if the King, on complaint made of the Justices, cause the record to come before him, and the exception be not found in the roll, and the party show the exception written, with the seal of the Justice affixed, the Justice shall be commanded that he appear at a certain day, to confess or deny his seal; and if the Justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." It appears to me plain, upon reading

T. T. 1852.  
*Esch. Cham.*  
BANK OF  
IRELAND  
v.  
TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

this Act, that it was thereby intended, and necessarily implied, that the moment the exception was tendered to, and received by, the Judge, it was his duty to deal with it as if it constituted a portion of the record; for the provision is, not on complaint made of the omission to include the exception in the record, but of the erroneous judgment; then the exception is to be placed on the record, and it provides against the contingency of that omission of the Judge. According to the true construction of that statute, from the very moment the exception is tendered to the Judge, and received by him, it should be dealt with in such a way as, when the proceedings are removed to another Court, the exception should constitute part of the record. Let us then see how the Courts have dealt with this statute. No doubt, in England the course has been, when a bill of exceptions is tendered to a Judge, and received by him, to deal with it as part of the record, and the exception is not noticed or considered in the Court below, but is transmitted to the Court of Error, when the validity or invalidity of that exception comes under consideration. It appears to me that the case of *Kennedy v. Gregg* was decided on what may be thought the true construction of this Act, because it says, "If the King, on complaint made of the Justices, causes the record to come before him;" that must be in a Court of Error; he could not cause the record to come before him until the judgment was given, which is in its nature final; therefore, until final judgment the record could not be removed: but it does not decide what should be on the record, when the period for removal arrives. In England, the practice is, when once it becomes part of the record, it never ceases to be so. In England, final judgment is always given, in the first instance, against the excepting party; the judgment must always follow the finding of the jury. It is clearly established that a different practice has been followed in Ireland, and the Court out of which the record issues has, from the earliest time, taken upon themselves to consider the bill of exceptions, and allow or disallow them, as they think proper; but if they disallow the exceptions, the excepting party has the means of setting the matter right by bringing a writ of error. Such being the course of pro-

ceeding in England, and the practice adopted in Ireland having been disapproved of by the then Court of Appeal, we are bound to consider the proceedings in England as correct, and the proceeding in this country as not in accordance with the statute, namely, the Court below taking on itself to decide the validity or invalidity of the exceptions. The case of *Symmers v. The King*, and *Davenport v. Tyrrell*, prove this. They prove the existence of the practice in Ireland, and the disapproval of it by the then Court of Appeal. I quite agree with the observations made by my Brother PENNEFATHER on this subject; for although I admit, if a statute apply to England or Ireland alone, and if there be a settled construction put on that statute by all the Courts in either country, that construction will be the law, even though wrong: but I doubt that the rule can apply to different constructions put upon the same statute in the different countries, by different Courts in the same country, as was the case for several years in this country—the Court of Exchequer putting one, and the Court of Queen's Bench another, construction on the Ejectment Statutes. It was impossible that both could be right, and one or other should alter their practice according to the decision of the Court of Appeal.

It is unnecessary to follow this argument further; for whatever may be the construction put on the Statute of Westminster, O'Neill's Act appears to me to be a legislative declaration that the Irish practice was wrong—by wrong I mean illegal. The recital of that Act appears to me a legislative declaration that it had been decided that the Courts had been doing what they were not authorised to do by the Statute of Westminster, and then proceeds to provide a remedy for this. The question then is—what was the remedy provided? No doubt, up to that time, a different practice had existed in both countries. That Act was passed to give jurisdiction to the inferior Court to consider a bill of exceptions; the preamble of the statute shows that. But the question is, whether to proceed according to the then existing practice in Ireland, or the different practice in England? It then enacts:—"That it shall be sufficient if the Judge, to whom such bill of exceptions shall be tendered, sign the

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852. *Esch. Cham.* "same, and that it shall not be necessary for him to put his seal  
 BANK OF "thereto." (Great stress has been laid on the substitution of the  
 IRELAND Judge's signature for his seal, but I do not think that has any effect  
 v. on the construction of the Act). "And that such bill of exceptions,  
 TRUSTEES "so signed, shall remain with the clerk of Nisi Prius, and be incor-  
 OF EVANS' porated in the *postea*, and be returned therewith to the Court in  
 CHARITIES. "which the action is brought, which Court shall have authority to  
 "examine the same, and give judgment thereon." That must mean  
 final judgment, and that final judgment was to be given on the  
 verdict previously found. But if the record be in such a position as  
 that they ought not to give final judgment, then they are to do one  
 of the several other matters mentioned in the section, "or make  
 "such order (that may be an interlocutory order, but the thing done  
 "in pursuance thereof must be entered on the record), either by  
 "arresting the judgment, granting a *venire facias de novo*, or other-  
 "wise, as shall be agreeable to justice." Now, what is the meaning  
 of a *venire facias de novo*? It is utterly impossible there can be a  
 writ of *venire facias de novo*, unless there has been a previous  
*venire* in the case. The distinction between a *venire* and a *venire*  
*de novo* is plain. When the writ issues in the first instance it is on  
 the record, and when a new trial is granted there is no *venire facias*  
*de novo*, but a new *venire* is entered in place of the previous one.  
 Suppose a case of this description—a declaration, plea, bill of  
 exceptions and judgment for the defendant. If the exceptions be  
 overruled, *primâ facie* judgment would be for the defendant.  
 Suppose, then, every thing right but the plea, which is bad, the  
 award would be judgment for the plaintiff, *non obstante veredicto*,  
 and an award of a *venire facias de novo* to assess the damages.  
 Therefore, according to the true construction of the Act, all that  
 was intended was, in my opinion, to give the inferior Courts juris-  
 diction which should be exercised in every respect in the same  
 manner as a Court of Error did under the Statute of Westminster.

But then, it is said, admitting that to be the true construction,  
 yet as it is an Irish statute, and no corresponding one in England, it  
 was therefore competent for the Irish Courts to put a construction

upon it; and although that construction be wrong, yet that we ought to be bound by it. I do not dispute the existence of a rule of that description; but before we put a construction on a statute different from what, in our opinion, ought to have been, we should be satisfied that it has uniformly received that wrong construction, and that such a construction would be conducive to the attainment of justice. I think, adopting such a construction as is contended for would add considerably to the expense, because, in all cases in which the Court below allowed exceptions which the Court thought should have been overruled, there would be involved the necessity of at least three trials.

But has there been a uniform construction? I do not think there has been such a uniform construction as would justify us in departing from what we consider to be the true construction. It may be true, with the exception of *Howard v. Shaw*, and *Begbie v. Clark*, the record has been made up similar to the present, but does it appear that either party required it to be otherwise made? If in these cases it was done with consent, the Court was not called on to interfere. Subsequent to the passing of the statute 28 G. 3, the Courts in this country conceived they had the authority of doing what Courts of Error had not authority to do in England, namely, to change a verdict for one party into a verdict for the other. In *Galway v. Baker*, the House of Lords were of opinion that such a practice was contrary to the true construction of the Act; but before they overruled it, they thought it necessary to make inquiries respecting its alleged existence; but they were not followed up, as a consent was entered into to dispose of the case on the merits. The fact, however, has been, that in consequence of that case of *Galway v. Baker*, we have altered our previous practice, and the settled rule now is, not to alter a verdict for one party into a verdict for the other, but award a *venire de novo* in case of exceptions being allowed. In the case of *Trimleston v. Kemmis*, the House of Lords also overruled a practice previously existing in this country. It therefore occurs to me that, even if we had this practice subsisting since the 28 G. 3, and if, according

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

to the opinion of the House of Lords, that practice was wrong, it does not occur to me that it would meet a better fate than the two other practices to which I have referred. It also occurs to me that the opinion of the Judges in the case of *Lord Trimleston v. Kemmis* must be considered as the decision of the Supreme Court on the true construction of the Irish Act, though the precise question which arose in that case is different from that arising in the present. On the whole, therefore, I think we are not only at liberty, but we are bound, to consider the propriety of the ruling of the Court below on these exceptions.

The next question then is, whether the exceptions taken at the trial ought or ought not to have been allowed by the Court below?

I quite agree with my LORD CHIEF BARON, that the words used by a Judge at *Nisi Prius* ought not to be too critically scanned, if we can, with reasonable certainty, ascertain the meaning of the words used. I admit the language used by the learned Judge at the trial admits of verbal criticism. It appears, however, plain to my mind that, at the trial, the Bank contended, first, that they had done every thing they could reasonably do in order to prevent deception being practised on them. Doing that would be doing very little, for it is not contended that it is enough for them to show that there was no default on their part, for they admit they are responsible, unless there was default on the part of the trustees which superinduced the loss in question. The charge establishes that these powers of attorney in question were forgeries, and, therefore, whether attested or not, in the manner required by the Bank Act, the seal of the corporation, though the impression was genuine, was a forgery. The Judge, therefore, told the jury that, if they believed the evidence offered by the plaintiffs in support of the issues, the said documents, purporting to be letters of attorney, were all forgeries; and that, believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion, upon the evidence, and come to the conclusion that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclu-

sively by neglect or default of the plaintiffs. That word "exclusively" means that there was no neglect on the part of the Bank. Now, I do not question the propriety of this charge in many cases that may occur; but the question is, is it applicable to the present? Was there any evidence of such negligence on the part of the trustees as would or ought to deprive them of their right to this stock? The action is for refusing to allow a transfer to be made of this stock. There was no such count in the declaration in the case of *Davis v. The Bank of England*. There were in that case only two sets of counts—one for improperly transferring the stock, and the other for not paying over the dividends; and on the first set of counts a verdict was entered for the defendants, the Court being of opinion that the transfer, under a forged power of attorney, was, in fact, a nullity, and that, to all intents and purposes, the stock still stood in the plaintiff's name. That case, therefore, decides that the stock, the subject of the present action, must be considered as still standing in the names of the plaintiffs, the trustees. The defence of the Bank is to this effect:—the plaintiffs have been negligent in the custody of their seal, and, by reason of such negligence, Grace has been enabled to commit the forgery and perpetrate the fraud which has imposed on the Bank, and given these parties a claim on them for the plaintiffs' stock, and therefore that the plaintiffs cannot be allowed to claim the stock, which, as I have already stated, must be, in point of law, considered as still standing in their names. It is plain that this defence is based altogether on the supposition that there has been culpable neglect on the part of the plaintiffs, the trustees of the charity. The question, then, at once arises, was there any neglect at all on the part of the trustees? They allowed their common seal to remain in the custody of a man who, upon the evidence, appears to have been a man in a respectable station and position in life during the whole time, and therefore there was no reason to suppose him to be an unfit person to be entrusted with that custody. There was no evidence of any usage in other corporations, nor is there, that I am aware of, any general rule of law rendering it wrong in a corporation to allow

T. T. 1852  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.



T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

their seal to remain in the custody of their agent, he being a man in a respectable position. At one time I was a little struck by the section of the Act incorporating the trustees, which provides for the custody of the seal, and I was pressed by the argument that no evidence was given of any rule having been made by them in pursuance of that provision; but, on the other hand, no evidence was given by the Bank of the non-existence of such a rule, as there might have been, as it does not appear to me to be requiring them to prove a negative, for several of the trustees were examined, and they might have been asked the question. There is nothing, then, to lead the Court to conclude that no rule was made by the trustees for the custody of their seal; and if they had made a rule entrusting its custody to Grace their agent, I do not see on what grounds we should hold that such rule would be an improper one. Before we could come to any such conclusion, we should consider what use could have been made of their seal. The trustees are a charitable corporation, and the principal part of their property consisted of lands. No doubt, this use of the seal could not pass the land. Was, then, the leaving the seal with Grace negligence leading to the act in question? The trustees must be presumed to have known the law; they must be presumed, therefore, to have known that the mere affixing of the seal could not authorise any person to meddle with their stock. That did not authorise the Bank to act on it. Before they are authorised to act, the sealing, by the trustees, must be attested by two credible subscribing witnesses; therefore, the allowing the custody of the seal to remain with Grace was not, in my opinion, any neglect on the part of the trustees, especially as the affixing it by Grace to the power of attorney could not have imposed on the Bank, unless the attestation of two credible witnesses had in some way been obtained. I do not mean to say whether the Bank were guilty of negligence or not; the jury have found that they were not; and it is not, in my opinion, for us to consider the propriety of that finding. I am of opinion there was no evidence of negligence in the trustees, and, therefore, that the judgment of the Court of Queen's Bench on the exceptions ought to be affirmed.

LEFROY, C. J.

There are two questions in this case—one relating to the documents furnished to the Court on this writ of *certiorari*, and the other upon the supposition that we are at liberty to look at these documents, and what effect they may have in respect to the rulings at the original trial. The question comes to this, whether the officers of the Court were warranted in treating the bill of exceptions precisely as they would treat an order of the Court on a motion for a new trial?

It has been argued that there has been such a long course of practice as would justify the officers in making up the record in this form. That brings me, therefore, to the construction of the Statute of Westminster 2, and 28' G. 3, independent of this practice. Now it is clear that the Statute of Westminster intended the bill of exceptions to be part of the record. The judgment the Court are there called on to give is a judgment allowing or disallowing the exceptions. There is no distinction taken there between the allowance or disallowance of a bill of exceptions. If one be a judgment, is not the other also? The judgment, therefore, is not the awarding a *venire de novo*, but the allowing or disallowing of the exceptions; and if the order carry out the judgment, as a matter of necessity a *venire de novo* should be awarded; it is, therefore, a great mistake to consider the award of the *venire de novo* as being a judgment; it is but an order to carry out the judgment by allowing the exceptions, and that can only be provided for by a *venire de novo*. Under this statute, therefore, the judgment is not the *venire de novo* awarded, but that the exceptions be allowed, and therefore the Court will award a *venire de novo* to carry out that judgment; and there is, therefore, no reason why this should not be viewed as a judgment: it is so in England. The cause that it cannot be reviewed until after final judgment arises from this, that you cannot have a bill of exceptions examined except in a Court of Error, and you cannot have a writ of error until after final judgment. In England, where there is a judgment of a Court of Error affirming the allowance or disallowance of exceptions, it may be reviewed in a

T. T. 1852.

*Exch. Cham.*BANK OF  
IRELAND

v.

TRUSTEES  
OF EVANS'  
CHARITIES.

T. T. 1852.  
*Esch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

Superior Court; and the argument then is, that although in England you may review the judgment of the first Court deciding on the exceptions, yet it is said you cannot do that in this country, on account of the statute of 28 G. 3—that it virtually repealed the Statute of Westminster in this respect. I consider that argument utterly untenable. This, then, being a statutable judgment, it follows that it must be capable of being reviewed upon a writ of error: *Fitz. N. B.* That shows that whenever it is brought in, it becomes part of the record *ab initio*.

But we are told now, that even in a Court of Error we are not to look upon it; that it should not be in the original record, although the Statute of Westminster says it should be on the roll, and has admitted it to be part of the record *ab initio*. The same appears in *Lilly's Prac. Reg.*, p. 189, and in *Lilly's Entries*, p. 248, the case of *Strode v. Palmer*. There we have a writ of error set forth, first stating the pleadings, then the *venire* and return thereto, the *distingas* and return, the *postea* and finding of the jury, and the bill of exceptions and proceedings thereon, all returned as part of the record. So also in *Searle v. Lord Barrington* (a), and *Loveday's case* (b). If that be the common law, why should the Court, under a statutable judgment, be deprived of the power of proceeding in a similar manner? I see no reason, upon the Statute of Westminster, and the practice adopted under it, why a party should be deprived of his writ of error.

If, therefore, upon the true construction of that statute, a party is entitled to bring a writ of error upon the allowance of the exceptions, has the 28 G. 3 put him in a worse position? I was surprised at that assertion, when we find that statute passed for the purpose of saving expense and preventing delay. That Act says the bill of exceptions is to be incorporated into the *postea*; how, then, can it be argued, that this bill of exceptions is not a matter of record?

I admit the Courts have approved of this practice, and that the continuances ought not to be departed from; but I should not act

(a) *Str.* 286.

(b) 8 *Coke*, 395.

retrospectively, and construe the Act of G. 3 as annulling the Statute of Westminster, and as confining the exercise of the judicial authority of the Court to the case of disallowing exceptions. When the *certiorari* was issued to the Court of Queen's Bench, they returned all these matters as matters of record existing in the Court itself; if, in their judgment, they were not on record, they should have dealt with the case as the Court of Common Pleas in England did in the case of *Gully v. The Bishop of Exeter*; when a *certiorari* was directed, they refused to return the matters sought thereby, because the orders were not judicial. These matters remaining of record in the Court below, the officer should have been directed to add them to the original record; they are now, however, before us, and the question is, are we to look at them? It is said, they are inconsistent with the record itself and the transcript. The argument, that you cannot contradict the record, is not applicable to the present case. What is the meaning of diminution? Diminution is something out of the transmiss that should be in it. It is equally error if there be something on the record of the Court below which should not be on it. The object of the *certiorari* is to inform the Court of Error what the true state of the record is; and if any of these matters be omitted, it is equally diminution. You may allege diminution in the body of the record: *Meredith v. Davis* (a). Here, then, was a *certiorari* to certify what was omitted in the transcript. The Court of Error are not merely to examine the judgment, but the proceedings in the case, and to ascertain whether the Court below has been right in its proceedings as well as in its judgment; so in the allegation of diminution, if any thing be omitted in the roll, which should be made part of it, the Court should call for it and have it certified to them.

The question then is, whether, even though these matters make an alteration in the body of the record, there is not authority for alleging diminution in the body of the record itself? Independent of the late statute respecting continuances, the authority and practice on this subject is stated in *Tidd's Prac.*, p. 162, which shows that they

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

(a) 1 Salk. 270.

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

are mere matters of form, and that any mistake of the officer in them cannot be held to be a ground of error. That, therefore, is an answer to the argument that we cannot examine these various matters, by reason of the continuances. For these reasons, I am of opinion that we must treat this as part of the record.

With regard to the merits of the case, I concur with the majority of the Court. The Legislature have provided affirmatively what is the adequate mode of transferring title to stock in the public funds. If a party chooses to be present, he may do so by signing his name, if not, by power of attorney. It was admitted that the powers of attorney, under which this stock was transferred, were all forgeries, therefore, *prima facie* the stock remains the property of the party. Now this is an action against the Bank, for the non-performance of their duty, in refusing to transfer this stock to the owner. Two issues were left to the jury—first, did the plaintiffs lose title to this stock by their negligence? and, secondly, did the Bank incur responsibility by their negligence? The latter was a correct issue; but the other was an issue by which it was not competent to try the title to this stock; but the issue suggested by the exception was the true issue. I do not mean to say that the plaintiffs might not have deprived themselves of the title to recover, upon evidence of such gross negligence as would have the effect of proving that they were actually or constructively conniving at or leading to the transfer. The simple issue, whether the plaintiffs have lost title, was not the issue to be left to the jury in such a case. Where an Act of Parliament, or the Common Law, gives a party a title, he cannot lose that title by negligence, unless the negligence be such as shows he assented to the transfer, or assented to the loss of the property. The issue must be on the transfer of title, not on the mere negligence; but even though it were an issue competent to try the merits, there is no evidence to sustain such an issue, even as a case of negligence. The case of *Davis v. Bank of England* went upon this, that the title to the stock was not transferred by the forged power of attorney, or by personation, as in *Coles v. The Bank of England*. If the Bank seek to

resist their liability, on the ground of the power of attorney being forged, they must show something that induced them to believe that the owner was the person who executed that power of attorney—that by his previous conduct, or by his subsequent or cotemporaneous assent, there was evidence to induce them to believe that it was his power of attorney; for he could not prosecute for the forgery if he warranted by his conduct a person putting his name to the power: therefore, all evidence to show that he assented to it, or led to it, all that would be evidence relevant to the issue, whether he could say that the power was a forgery or not. So, also, when there is personation, all evidence to show the personation was connived at, evidence to show he authorised it—that would be evidence relevant to the issue, whether the party did execute the power or authorise the execution or personation of it. The case of *Davis v. The Bank of England* never meant to shut out the evidence that the party acted in such a manner as to induce the Bank to believe the power was executed by him. Suppose they handed Grace the power of attorney to put the seal to it, then there would be negligence; but here they merely entrusted him with the seal. Every man is answerable for the legal, natural and necessary consequences of his own act; and if the giving the seal was the legal, natural and necessary consequence of the forgery, I admit he is answerable. But is that so? The trustees were authorised to employ a party to keep their seal. If they were to be made answerable for the abuse of the keeping of the seal, there never could be safe custody of it. That case of *Davis v. The Bank of England* was not overruled, the judgment was reversed on a point of form; and there the question was left to the jury, that should have been left in the case, whether the conduct of the party was likely to bring about this. There was there cogent evidence that the stock was properly reduced by the concurrence of the owner; and the question was not left to the jury in the simple form; it was left in this case but a special issue.

*Marsh v. Keating* (a) shows, by a series of authorities, that Courts in England acted on that principle in respect to public bodies

T. T. 1852.  
*Exch. Cham.*  
 BANK OF  
 IRELAND  
 v.  
 TRUSTEES  
 OF EVANS'  
 CHARITIES.

(a) 2 Cl. & F. 264.

T. T. 1852.  
*Each. Cham.*

BANK OF  
IRELAND  
v.

TRUSTEES  
OF EVANS'  
CHARITIES.

which had similar duties; and in all these cases a public company were held answerable, unless they could show the owner of the property had induced or led to the forgery. The results of allowing this issue would be, that you would saddle the trustees with a suit in a Court of Equity for the recovery of this stock; for, if the negligence be such as is insisted, the trustees must be held liable for a breach of trust, and you would, therefore, have an issue knit involving them in a responsibility of this sort. This is an action for a breach of duty in not transferring this stock, and the evidence is applicable to a party being exempted from making the transfer; but it is enough to say there was no evidence to make the trustees liable for this loss. General negligence is no evidence whatever, for a party is not to be presumed to intend the commission of a felony.

Judgment affirmed.

T. T. 1853.

Exchequer.

## CHARLES MALLEY

v.

EDWARD HORNSBY, Secretary to the Commissioners of  
Public Works in Ireland.

(Exchequer.)

May 24.

CASE.—The declaration contained six counts.

First count.—“For that whereas before and at the time of the committing of the grievances by the said Commissioners of Drainage, as hereinafter next mentioned, the said Charles Malley was, and from thence hitherto hath been and now is, lawfully possessed of a certain flour-mill, water-wheel, machinery and premises, for the grinding and preparing of flour, situate and being at Cong, in the county of Galway; and during all that time of right ought to have had and enjoyed the free use and benefit of a certain river, stream or watercourse, to wit, the river, stream or watercourse

Bill of exceptions.—Case, by a mill-owner against the Commissioners of Drainage in Ireland, for having made a canal and tap-drain, and set up obstructions in the mill-stream water, whereby the working power of his mill was injuriously affected, both

by the amount of head-water being lessened, and by throwing back-water on the wheel. The declaration did not charge the Commissioners with negligence or want of skill in the execution of the works. The works were of two kinds—drainage simply, and navigation and drainage combined; and the injuries complained of were connected with both species of operations. The works had been undertaken under the provisions of the 5 & 6 Vic., c. 89, and 9 Vic., c. 4. The defendant gave in evidence at the trial the publication of the final notice in *The Dublin Gazette*, pursuant to those statutes, and contended that it was conclusive of all preliminaries having been performed, and that it conferred jurisdiction; but admitted that no declaration, as required by the 5 & 6 Vic., c. 89, s. 33, had, in fact, been made or served upon the plaintiff; also, that a declaration was not necessary under the provisions for summary proceedings of 9 Vic., c. 4; also, that the action at Common Law was taken away by 5 & 6 Vic., c. 89, s. 38, and by 9 Vic., c. 4, s. 18; and called for a nonsuit. The Judge refused to nonsuit, and the plaintiff obtained a verdict.—*Held*, that the publication of final notice did not cure the want of a declaration, and confer jurisdiction.

*Held also*, that a declaration was necessary to confer jurisdiction, where mills or factories were interfered with, notwithstanding the provisions for summary proceedings.

*Held also*, that the provisions for summary proceedings applied to drainage alone, and not to navigation connected with drainage.

*Held also*, that the action at Common Law was not taken away by these statutes, when the Commissioners acted without jurisdiction.

*Quare*—Whether the Commissioners can invest themselves with jurisdiction, even though to lessen the amount of the working water-power of a mill; and if they do so, whether an action at Common Law does not lie?



T. T. 1853. "then and there leading from a certain lake, to wit, Lough Mask,  
*Eschequer.*  
 MALLEY  
 v.  
 HORNSBY. "wheel and machinery of the said Charles Malley, which, before and  
 "until the committing of the grievances by the said Commissioners of  
 "Drainage hereinafter in this count mentioned, was used and accus-  
 "tomed to run and flow, and during all that time of right ought to  
 "have run and flowed, and still of right ought to run and flow  
 "in great plenty, and in its usual proper course, flow and current,  
 "for the supplying of said corn-mill, water-wheel and machinery,  
 "for the effectual working thereof—yet the said Commissioners of  
 "Drainage, well knowing the premises, but intending to injure the  
 "said Charles Malley, and to deprive him of the use and benefit of  
 "the water of said river, stream or watercourse, and to hinder him  
 "from working his said flour-mill as effectually as he had thereto-  
 "fore done, to wit, on the 1st day of November 1849, and on divers  
 "other days and times between the said last mentioned day and the  
 "commencement of this suit, to wit, at Cong, to wit, at Galway in  
 "the county of Galway, wrongfully cut and dug in and out of the  
 "sides of the said stream or river, in divers places higher up in the  
 "said stream or river than the said flour-mill, divers, to wit, twenty  
 "cuts and trenches, of great length, width and depth, to wit, one  
 "hundred feet long, ten feet wide and ten feet deep, and sunk, dug  
 "and excavated the bed and channel of the said river, stream or  
 "watercourse, above the said flour-mill of the said Charles Malley,  
 "in divers, to wit, twenty other places: and from thence hitherto  
 "kept and continued, and still keep and continue the said cuts and  
 "trenches, sinkings, diggings and excavations, and by means thereof  
 "directed the water of the said river, stream or watercourse, where  
 "the said several cuts and trenches were so made as aforesaid, out  
 "of the ancient channel of the said river, stream or watercourse, by  
 "means whereof the water of the said stream was made to flow  
 "partly in the new cuts and trenches, and partly in the said ancient  
 "channel, so deepened and lowered as aforesaid, whereby the water  
 "of the said river, stream or watercourse was repeatedly drained  
 "off and exhausted, and was hindered from running and flowing

“along in its usual gradual uniform course to the said corn-mill, T. T. 1853.  
 “water-wheel, machinery and premises of the said Charles Malley, *Exchequer.*  
 “and with supplying the same with water for the uniform and *MALLEY*  
 “necessary working thereof, as the same of right ought to have *v.*  
 “done, and would otherwise have done; and by reason thereof *HORNSBY.*  
 “the said Charles Malley was during all that time greatly hin-  
 “dered and obstructed in the working of his said flour-mill, for  
 “want of sufficient water for the uniform working thereof, and  
 “thereby during all that time lost the profit and advantage of  
 “his said flour-mill, to wit, at Cong, to wit, at Galway in the  
 “county of Galway aforesaid.

Second count.—“And whereas also, before and at the time of  
 “the committing of the grievances, &c., the said Charles Malley  
 “hath been and now is lawfully possessed of a certain other flour-  
 “mill, water-wheel, &c., at Cong, &c., and thence during all that  
 “time of right ought to have had and enjoyed, and still ought to  
 “have and enjoy, the full use and benefit of the water of a certain  
 “other stream, river or watercourse, to wit, the river of Cong in the  
 “county of Galway aforesaid, which, before and until the committing  
 “of the grievances by the said Commissioners of Drainage herein-  
 “after in this count mentioned, was used and accustomed to run  
 “and flow, and during all that time of right ought to have run and  
 “flowed, and still of right ought to run and flow in great plenty,  
 “and in its usual proper course, flow and current unto and  
 “into the said flour-mill, water-wheel and machinery, for the effec-  
 “tual supply and working thereof—yet the said Commissioners, &c.  
 “—[as in first count]—wrongfully and unjustly made, erected,  
 “set up, and caused and procured to be made, erected and set  
 “up, divers, to wit, ten mounds and ten dams, with certain large  
 “stones, mortar and pieces of timber, and caused to be erected  
 “certain other obstructions in and across the bed, current or  
 “channel of the said stream, river or watercourse, at divers, to  
 “wit, ten paces higher up in the said river, stream or water-  
 “course, than the said last mentioned flour-mill and premises of the  
 “said Charles Malley, to wit at, &c.; and unjustly kept and conti-  
 “nued the said mounds, dams and obstructions, so then wrongfully

T. T. 1853. *Exchequer.*  
**MALLEY**  
*v.*  
**HORNSBY.**

"and unjustly made, erected and set up, for a long time, to wit from  
 "thence hitherto, and thereby during all that time wrongfully  
 "dammed up, hindered, obstructed and stopped the water of the  
 "said river, stream or watercourse from running in its usual ancient  
 "plentiful and uniform manner to the said flour-mill of the said  
 "Charles Malley, whereby the said Charles Malley was during  
 "all that time greatly hindered and obstructed in the working of  
 "his said flour-mill, for want of sufficient water for working the  
 "same, and thereby during all that time lost the benefit and  
 "advantage of said mill, and was otherwise injured in his trade  
 "and business as such miller as aforesaid, and lost the custom  
 "and employment of divers persons who, but for the grievances  
 "in this count mentioned, would have employed the said mill of  
 "the said Charles Malley, to wit at," &c.

Third count.—"And whereas also," &c.—[recites plaintiff's possession of the mill and enjoyment of a river as before, and that]—  
 "said river was used and accustomed to run and flow, and during  
 "all that time ought to have run and flowed, and still of right  
 "ought to run and flow in great plenty, and in its proper course,  
 "flow and current, into and unto the said flour-mill, &c.; and from  
 "thence through the tail-race leading therefrom, without causing  
 "any back-water or obstruction to the free and efficient working  
 "of the wheel and machinery of the said flour-mill—yet the said  
 "Commissioners, &c., wrongfully made, erected, set up and caused  
 "and procured to be made, erected and set up, divers, to wit,  
 "ten mounds, ten stanks, ten sluices and ten dams, with certain  
 "large stones, mortar and pieces of timber, and caused to be  
 "erected certain other obstructions in, across and on the bed,  
 "current or channel of said river, stream or watercourse, at divers,  
 "to wit, forty paces higher up in the said river, stream or water-  
 "course, than the said last mentioned flour-mill, &c., to wit, near  
 "Lough Mask aforesaid, to wit, at Cong, &c., and unjustly kept  
 "and continued the said mounds, stanks, sluices, dams and ob-  
 "structions, so then wrongfully and unjustly made, erected and  
 "set up, for a long time, to wit, for the period of two years and  
 "three months, to wit, from the said 1st day of November to the

"19th day of January 1852, and thereby during all that time  
"dammed up and collected a great quantity of water in Lough Mask  
"aforesaid, and then and there wrongfully and unjustly dammed up,  
"hindered, obstructed and stopped the water of the said river, stream  
"or watercourse from running in its ancient, plentiful and uniform  
"manner to the said-flour mill, water-wheel and machinery of the  
"said Charles Malley: and the said Charles Malley saith that during  
"the time last aforesaid, to wit, between the 1st day of November  
"1849 and the 19th day of January 1852, to wit, at Cong, to wit, at  
"Galway, in the county of Galway, aforesaid, the said Commissioners  
"then and there dug, cut and excavated a certain stream or drain,  
"to wit, a tap-drain leading from the said stream or watercourse so  
"flowing to the said mill as aforesaid, to a point higher up in said stream  
"or watercourse than the said mill, but lower down in the same than  
"the said dams and obstructions, and which said stream or tap-drain  
"was so dug and excavated in a direction leading away from the said  
"mill of the said Charles Malley, and on to a point in said stream or  
"watercourse, to wit, twenty yards below the said mill of the said  
"Charles Malley, to wit, in the tail-race leading therefrom; and the  
"said Commissioners, well knowing the premises, but contriving,  
"&c., to wit, on the 19th day of January 1852, wrongfully and  
"injuriously removed the said dams, stanks, sluices and obstructions;  
"thereby, and by reason of said removal, the waters so dammed up as  
"aforesaid then and there suddenly escaped from said lake, and  
"rushed with great force and violence through the said stream or  
"tap-drain so constructed as aforesaid, down to the tail-race of  
"the mill of the said Charles Malley, whereby the free and un-  
"interrupted flow of said tail-race was then and there and from  
"thence hitherto greatly obstructed, and a greater quantity of water  
"caused to flow to and into the said tail-race than it theretofore  
"contained, whereby the back-water was then and there thrown  
"upon the water-wheel of said mill and machinery to a great height,  
"to wit, the height of six inches, and the working power thereof  
"greatly diminished and impeded, whereby the said Charles Malley  
"was during all that time greatly hindered," &c.—[an averment of  
"general damage only.]

T. T. 1853.

*Eschequer.*MALLEY  
v.

HORNSBY.

T. T. 1853.

*Exchequer.*

MALLEY

v.

HORNSBY.

Fourth count.—This count is similar to third, but alleges that the Commissioners “wrongfully and injuriously, and without notice to the said Charles Malley, to wit on, &c., removed the said dams, “stanks and obstructions,” &c., and also, in addition to general damage, avers as special damage that the plaintiff “was otherwise put to “great trouble and expense, to wit the expense of £50, in staunching, “amending and altering the dam or weir of his said mill, for the “purpose of retaining a quantity of water sufficient to countervail “the loss thereof occasioned and rendered necessary by said last “mentioned grievances, to wit at,” &c.

Fifth count.—This count, after stating, as in the former counts, the plaintiff’s possession of a mill and enjoyment of a certain river, averred that the Commissioners, well knowing the premises, &c., “wrongfully and unjustly diverted and turned large quantities of “the water of said last mentioned stream and watercourse out of the “same, and away from the said last mentioned mill and premises of “the said Charles Malley, and then and there hindered and prevented the water of the last mentioned stream or watercourse “from running or flowing along its usual course to the said last “mentioned mill and premises of the said Charles Malley, and from “supplying the same with water for the necessary working thereof, “as the same ought to have done, and otherwise would have done; “and by reason thereof the water of the said last mentioned stream “or watercourse, sufficient for working and supplying of the said “last mentioned mill and machinery during that time, could not, nor “did, then and there run and flow to the same as the same ought to “have done, and otherwise would have done; and the said Charles “Malley during all that time could not use his said mill, or exercise “his trade or business therein, in as large, extensive and beneficial “a manner as he ought to have, and otherwise would have done, “and by means thereof the said Charles Malley has lost the custom “of divers persons, who, heretofore and previous to the committing “of the said grievances by the said Commissioners, purchased flour, “meal and other stuffs at the said mill and premises of the said “Charles Malley, and the said Charles Malley necessarily incurred “great expense in the hire of men, carts and horses, to wit, the sum

“of £100, in procuring and obtaining from other mills, to wit, in  
 “the county of Galway aforesaid, and from a great distance, to wit,  
 “the distance of twenty miles, flour, meal and other stuffs for the  
 “supplying of his said customers, and for the purpose of keeping up  
 “and maintaining his said trade and business therein, and was  
 “otherwise put to great trouble and expense, to wit, the expense  
 “of £50, in necessarily staunching, amending and altering the dam  
 “or weir of his said mill, for the purpose of thereby retaining a  
 “quantity of water sufficient to countervail the loss or diminution  
 “thereof occasioned by said last mentioned grievances, and was  
 “otherwise greatly injured in the premises, to wit, at Cong aforesaid,  
 “in the county of Galway aforesaid.”

T. T. 1853.

*Exchequer.*MALLEY  
v.  
HORNSBY.

Sixth count.—“And whereas also, the said Charles Malley, on  
 “the 1st day of November 1849, and long before, and up to the time  
 “of the committing of the grievances by the said Commissioners,  
 “hereinafter next mentioned, was lawfully possessed of and in a cer-  
 “tain ancient eel-weir and the appurtenances, situate and being in  
 “the said watercourse, leading from said Lough Mask to Lough Cor-  
 “rib, adjacent to the said flour-mill of the said Charles Malley, to  
 “wit, at &c., for the taking and catching of eels there, and during all  
 “that time was lawfully entitled to the sole right and privilege of  
 “taking eels by the said eel-weir.

“And whereas, during all that time last aforesaid, and until the  
 “committing of the said last mentioned grievances, the said Charles  
 “Malley made great gains and profits, and still of right ought to  
 “make great gains and profits by the catching and taking of eels in  
 “the said eel-weir, yet the said Commissioners of Drainage, well  
 “knowing the premises, but contriving and intending to injure the  
 “said Charles Malley in this behalf, and to deprive him of the use,  
 “benefit and advantage of the said eel-weir, whilst the said Charles  
 “Malley was so possessed thereof, and entitled as aforesaid, to  
 “wit, on the said 1st day of November 1849, and on divers days  
 “and times between that day and the commencement of this suit,  
 “then and there wrongfully and unjustly diverted and turned large  
 “quantities of the water of the said last mentioned stream or water-  
 “course out of the same, above the said eel-weir, and during all

T. T. 1853. *Exchequer.*  
**MALLEY**  
*v.*  
**HORNSBY.**

"that time hindered and prevented the said water from flowing and  
 "running with its usual full and sufficient supply, and in its usual  
 "course and channel to the said eel-weir, in as copious and bene-  
 "ficial a manner as it otherwise might and would have done; and  
 "for want of a sufficient supply or stream of water running through  
 "and over the said eel-weir in the usual and ancient course of  
 "the said stream or watercourse as aforesaid, the number of or  
 "quantity of eels theretofore taken therein has been and is greatly  
 "decreased, and the said Charles Malley has wholly lost the benefit  
 "and enjoyment of said eel-weir; and same, for want of sufficient  
 "water, as aforesaid, has become wholly worthless and unprofitable,  
 "to wit, at," &c.

The defendant pleaded the general issue.

The trial took place before Mr. Justice Jackson, at the Spring Assizes at Galway, 1853.

It appeared from the bill of exceptions that the plaintiff gave in evidence an indenture of lease bearing date the 1st of June 1846, whereby a certain water-mill and premises, situate at Cong in the county of Galway, were demised to the plaintiff, to hold to him, his executors, administrators and assigns, for a certain term of years, at a rent therein named; also notice of action, bearing date the 15th day of December 1852, served by the plaintiff on the defendant, and an order of this Court, bearing date the — day of January 1853, giving liberty to the plaintiff to bring the action; and then produced witnesses who deposed "That the plaintiff was owner of the mill demised  
 "by the aforesaid indenture of lease, and used and occupied the  
 "same thereunder; that the said mill was situated at Cong, in the  
 "county of Galway, between the two lakes known as Lough Mask  
 "and Lough Corrib; that the said two lakes are distant about three  
 "miles from each other, and have a difference of level between  
 "thirty and forty feet, Lough Mask being the higher of the two.  
 "That until the Commissioners of Drainage commenced the works  
 "hereinafter mentioned, there was no communication between the  
 "two lakes, but that the water escaped from Lough Mask into  
 "Lough Corrib by subterraneous passages, and that a volume of  
 "water bursting up from one of those subterraneous passages, a-

"short distance above the plaintiff's mill, formed a pond which fed  
 "and worked the wheel of the plaintiff's mill; and that the water,  
 "after flowing past the wheel of the plaintiff's mill, disappeared  
 "through certain swallow-holes which were situate in the tail-race  
 "of the mill, and at a short distance from the wheel thereof, and  
 "also through a cut theretofore widened and deepened by the  
 "plaintiff, leading from said tail-race to Lough Corrib, and thence  
 "into Lough Corrib. That until the Commissioners of Drainage  
 "commenced their works in the neighbourhood of said mill, there  
 "was always an abundant supply of water to the plaintiff's mill,  
 "save only for some short periods during the dry season of the year;  
 "that in the month of February 1848, the Commissioners of  
 "Drainage commenced extensive works in the neighbourhood of  
 "plaintiff's mill, for the purpose of constructing a navigable canal  
 "between Lough Mask and Lough Corrib; that the said Com-  
 "missioners commenced their works by excavating and deepening  
 "said cut or channel from the tail-race of the plaintiff's mill in  
 "Lough Corrib, and threw some of the stuff taken therefrom into  
 "the swallow-holes aforesaid; that the Commissioners of Public  
 "Works commenced the excavation of the navigable canal between  
 "Lough Mask and Corrib, at a short distance above the plaintiff's  
 "mill, and that they continued such excavation until it extended up  
 "to and into Lough Mask; that whilst such excavations were going  
 "on, numerous subterraneous caverns or fissures were discovered,  
 "through which large quantities of water rushed into the aforesaid  
 "canal; that for the purpose of discharging the water which so  
 "flowed into the said canal, and also that which was dammed up in  
 "Lough Mask by the dam or stank hereinafter mentioned, the  
 "Commissioners of Drainage excavated a tap-drain from the said  
 "canal, at a point about half a mile above the plaintiff's mill, and  
 "nearer to Lough Mask, which carried the water so discharged  
 "through the pores of said canal, and also that previously dammed  
 "up and collected in Lough Mask by said stank, as soon as same  
 "was removed into the tail-race of the plaintiff's mill, and through  
 "the aforesaid cut or channel into Lough Corrib; that whilst the  
 "Commissioners of Drainage were excavating the canal from Lough

T. T. 1853.  
*Exchequer.*  
 MALLEY  
 v.  
 HORNSBY.



T. T. 1853. *Exchequer.* “Mask into Lough Corrib, the said Commissioners constructed the  
 MALLEY “said dam or stank at the entrance of the canal, from Lough Mask,  
 v. “for the purpose of preventing the water of Lough Mask from  
 HORNSBY. “flowing into the canal in which the works were carried on; that  
 “on the 14th of January 1851, the said dam or stank was removed  
 “or lowered, and the water of Lough Mask was allowed to flow in  
 “large quantities into the canal, and through the tap-drain, and  
 “into the tail-race of the plaintiff’s mill, and thence into Lough  
 “Corrib. And they further deposed that in their opinion the effect  
 “of the aforesaid works, so carried on by the Commissioners of  
 “Public Works, was to diminish the supply of water to the plaintiff’s  
 “mill, and that the water which flowed through the tap-drain into  
 “the tail-race of the plaintiff’s mill injured the working power of  
 “the plaintiff’s mill, by throwing back-water upon the wheel  
 “thereof, and also diminished the head-water leading to said mill,  
 “and thereby caused considerable damage to the plaintiff.”

The plaintiff then produced Mathew Blackstone, civil engineer, who deposed as follows:—“I have had considerable experience; “have worked in connection with Sir John M’Neill for several “years; I traced the channels cut by the Commissioners of Drainage “up to the lake, assuming Lough Mask to be the head. The effect “of the works executed by the Commissioners will be to diminish “the supply to the mills; assuming there was no escape from Lough “Mask through the bank of the canal now cut, the effect of the “works must be to exhaust the summer supply; assuming the supply “to be conveyed through subterraneous passages, it must be greatly “reduced by the reduction of head-water; saw the flow of water “through the tap-drain into the lower pond or tail-race; saw “the conduit into Lough Corrib from the tail-race of the mill; “it does not carry away the water with the same rapidity as “the tap-drain conveys it into the tail-race.”—[Here witness referred to a red line traced on a map, produced and proved on the trial as correct, by a witness on behalf of the plaintiff, named Gallagher]—“If this tap-drain ran along the red line, it would “have carried the escape water into Lough Corrib, without throwing “back-water on the mill, &c.; that course is perfectly practicable; the

"entire expense of its formation would not be more than £500; I  
 "made my estimate on the ground; the water through the tap-  
 "drain strikes at right angles, the water in the tail-race thereby  
 "driving it back; the surface waters above the tap-drain are  
 "collected by the tap-drain itself, and carried by it into the tail-  
 "race, otherwise they would escape into swallow-holes away from  
 "the mill." Whereupon the plaintiff closed his case.

T. T. 1853.

Exchequer.

MALLEY

v.

HORNSBY.

The defendant produced, and read in evidence, *The Dublin Gazette*, bearing date the 1st day of October 1847, containing a final notice published therein, and bearing date the 22nd of September 1847, in the words following, that is to say:—"Board of Public Works, Drainage of Lands, under the Acts 5 & 6 Vic. c. 89; 8 & 9 Vic., c. 69; 9 Vic., c. 4; and 10 & 11 Vic., c. 79. Summary proceedings under 9 Vic., c. 4, and 10 & 11 Vic., c. 79.—District of Lough Mask and River Robe, in the counties of Galway and Mayo.—Final notice of compliance with the preliminaries required by the provisions for the summary proceedings under the Act of 9 Vic., c. 4, and 10 & 11 Vic. c. 79.—We do hereby notify and declare that all the preliminaries required by the provisions for summary proceedings, under the Act of the 9 Vic., c. 4, intituled 'An Act to amend the Acts for promoting the drainage of lands and improvement of navigation and water-power in connection with such drainage, in Ireland, and to afford facilities for increased employment for the labouring classes, in works of drainage, during the present year,' and the Act of the 10 & 11 Vic., c. 79, amending the same, previously to the commencement of the proposed works in the district of Lough Mask and River Robe, in the counties of Galway and Mayo, have been concluded. And we do hereby give this final notice, that all such preliminaries and requisitions under the provisions for summary proceedings as aforesaid, with respect to the lands within the said district, and proposed to be drained and improved, have been complied with.—HARRY D. JONES, THOMAS A. LARCOM, Commissioners of Public Works.—Dated at the Board of Public Works, Custom-house, Dublin, this 22nd day of September 1847."

And Counsel for the defendant did also produce and read in

T. T. 1853.  
*Exchequer.*  
 MAILEY  
 v.  
 HORNSBY.

evidence, on the part of the defendant, *The Dublin Gazette*, bearing date the 5th day of November 1847, containing a final notice published therein, and bearing date the 4th day of November 1847, in the words and figures following, that is to say :—"Board "of Public Works, Drainage and Navigation, under the Acts of "5 & 6 *Vic.*, c. 89 ; 8 & 9 *Vic.*, c. 69 ; 9 *Vic.*, c. 4., and 10 & 11 " *Vic.*, c. 79.—District of Loughs Corrib, Mask and Carra, in the "county of the town of Galway, and counties of Galway and Mayo.— "Final notice of compliance with the requisites of the above men- "tioned Acts.—We the Commissioners of Public Works in Ireland, "acting in execution of the above mentioned Acts, do hereby notify "and declare that the several preliminary measures and proceedings "by the Act of the 5 & 6 *Vic.*, c. 89, entitled 'An Act to promote "the drainage of lands and improvement of navigation and water- "power, in connection with such drainage, in Ireland,' and the "several Acts amending the same, directed to be taken and ob- "served previously to the commencement of the proposed works "in the district of Loughs Corrib, Mask and Carra, in the county "of the town of Galway, and counties of Galway and Mayo, have "been concluded: and we do hereby give this final notice, that all "the requisitions of the said Acts, with respect to the lands within "the said district proposed to be drained and improved, and also "with respect to the making and improving of the navigation "and mill-power within said district, have been complied with.— "J. RADCLIFF, THOMAS A. LARCOM, two of the Commissioners of "Public Works in Ireland.—Dated at the office of Public Works, "Custom-house, Dublin, this 4th day of November 1847."

The defendant then produced as a witness Mr. Samuel Usher Roberts, who deposed that the tap-drain or overflow channel of the plaintiff's mill and tail-race of it, and the head pond of the mill, were all situate within the district of Lough Mask and River Robe, and that the navigable canal was situate in the district of Loughs Corrib, Mask and Carra, and that all the acts done by the said Commissioners of Public Works, and whereof the said plaintiff complained, were done by them in execution of the works of drainage and navigation undertaken by them in the

district in said final notices mentioned. Whereupon Counsel for the defendant called upon the learned Judge "to nonsuit the plaintiff; or if he would not consent to be nonsuited, then to direct a verdict for the said defendant, upon the ground that an action at Common Law was not maintainable against the said Commissioners of Public Works, it not having been alleged or proved that the acts complained of, or any or either of them, had been occasioned by the negligence and carelessness, or want of proper skill and caution of the said Commissioners of Public Works, or of those acting for them, or had been done by them arbitrarily, or in excess of the jurisdiction conferred upon them by the several statutes in that case made and provided." And Counsel for the defendant further contended, and submitted to the learned Judge, "that the production of the aforesaid *Dublin Gazettes*, containing advertisements of the aforesaid several notices, was conclusive evidence of the publication of such final notices respectively, and was conclusive evidence that the several preliminary measures necessary to give the Commissioners of Public Works jurisdiction to do the acts complained of in the said plaintiff's declaration, and deposed to in evidence as having been done, had been duly taken and observed, and therefore that no action was maintainable against the Commissioners of Public Works for any such acts." And defendants, by their Counsel, in answer to the learned Judge, admitted that "no declaration had been deposited by them, or had been served on the plaintiff or his predecessors," and contended "that same was not necessary, as said works were executed under the summary proceedings of 9 Vic., c. 4, ss. 45, 46, 47, 48, 49, 50 and 51." The learned Judge refused to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant, but stated that he would leave the consideration of the evidence to the jury—to which ruling Counsel for the defendant excepted.

The defendant then went into evidence, and produced several witnesses, who amongst other things deposed "That the working power of the plaintiff's mill would not be injured by the works carried on by the Commissioners of Public Works, but on the contrary would be benefited thereby, and that the supply of

T. T. 1853.

*Exchequer.*

MALLEY

v.

HORNSBY.

T. T. 1853. *Eschequer.*  
**MALLEY**  
*v.*  
**HORNSBY.**

"water to the plaintiff's mill would not be thereby diminished." And one of the witnesses, Mr. Roberts, already mentioned, entered into the particulars of the works, in reference to their operation upon the plaintiff's mill, and stated, as the conclusion that he had arrived at, "That according to witness's skill and judgment, "none of the operations of the Commissioners of Public Works "had injuriously affected the plaintiff's mill as to back-water; "but, on the contrary, witness was of opinion that these operations had conferred very considerable benefit upon the plaintiff's mill, by giving it a constancy of supply of water, and by "relieving it from back-water." The same witness also deposed "That in May 1852, witness first heard any complaint of "want of head-water. That the complaint came from the "plaintiff; it was made at a period when witness was ill, and "the Board immediately sent down their principal engineer to "inspect the place; and upon witness's recovery in July, he, "witness, found that the eel-weirs at Lackburoe had been removed, "and a portion of the shoal there removed, for the purpose of letting "water pass through from the large to the minor lake. That "this was done by directions of the Commissioners of Public "Works, between the time of the complaint being made in May, and "witness's visit to the place in July, after his illness:" and stated that the effect of that work was to give the plaintiff an increased supply of water. Mr. Roberts, on his cross-examination, admitted that there had been some departure from the original plans.

The Counsel for the defendant, having closed his case, called upon the learned Judge "to direct a verdict for the defendant on each "and every of the several counts in the plaintiff's declaration, "inasmuch as neither carelessness or negligence on the part of "the Commissioners of Public Works, or those acting for them, "was alleged in any of these counts, and inasmuch as there was "not any evidence to go to the jury that in doing the acts "complained of, or any or either of them, the Commissioners "of Public Works had exceeded the powers given to them by "the several Acts of Parliament in such case made and provided."

Secondly.—Counsel for the defendant called on the said learned Judge "to direct and tell the jury that they ought to

“find a verdict for the defendant on each and every of the several counts in the plaintiff’s declaration, if they believed that in doing the Acts complained of, the Commissioners of Public Works, or those acting for them, had not exceeded the powers given to the Commissioners of Public Works by the several Acts of Parliament in such case made and provided; or that they, or those acting for them, had not, in doing those acts, been guilty of carelessness, negligence, or wilful default.”

T. T. 1853.  
*Exchequer.*  
MALLEY  
v.  
HORNSBY.

Thirdly.—Counsel for the defendant called upon the said learned Judge “to direct the jury to find a verdict for the defendant upon each and every of the several counts in the plaintiff’s declaration, inasmuch as there was not any evidence to go to the jury to show that any of the grievances in these counts, alleged to have been committed by the Commissioners of Public Works, were done by the said Commissioners in excess of the jurisdiction conferred upon them in and by the several statutes in such case made and provided, or by any arbitrary act or acts of the said Commissioners of Public Works, or of those acting for them, or in and by the negligence, carelessness or want of proper care, skill or diligence of the said Commissioners of Public Works, their workmen or servants.”

And fourthly.—Counsel for the said defendant called on the said learned Judge “to direct a verdict for the defendant on each and every of the several counts in the plaintiff’s declaration, inasmuch as the remedy of the plaintiff (if any) for the grievances alleged in these counts, and proved to have been done, was under the provisions of the several Acts of Parliament in such case made and provided. That no action at Common Law could be maintained for any such alleged grievances against the defendant;” and Counsel for the said defendant did then and there insist, before the said learned Judge, on behalf of the said defendant, “that the said several matters so produced and given in evidence on the part of the defendants were sufficient, and ought to be admitted and allowed as conclusive evidence to entitle the said defendant to a verdict, and to bar the said plaintiff of his action aforesaid.” And the said Counsel for the said defendant did then and there insist before the said

T. T. 1853. learned Judge, "that the said learned Judge ought to admit and  
*Eschequer.*  
 MALLEY  
 v.  
 HORNSBY. "allow the said matters so proved and given in evidence for the  
 "said defendant as conclusive evidence for the said defendant to  
 "entitle him to a verdict, and to bar the plaintiff of his action  
 "aforesaid." But the learned Judge refused to direct a verdict  
 for the defendant, and told the jury (amongst other things) that  
 the matters given in evidence on the part of the defendant were  
 not conclusive evidence to entitle the defendant to a verdict; and  
 also that if they believed "that the plaintiff had been injured  
 "by the drainage and navigation works proved to have been  
 "carried on by the Commissioners, even though they should  
 "believe that such works were skilfully executed, and that the  
 "said Commissioners had not been guilty of any carelessness  
 "or negligence as regarded the execution of the said drainage  
 "and navigation works, that the jury ought in such case to find  
 "a verdict for the plaintiff for such sum as in their opinion would  
 "be fair and reasonable compensation for the loss the plaintiff had  
 "sustained in consequence of such works." The jury then found  
 their verdict for the plaintiff for £200 damages and 6d. costs.  
 The Counsel for the defendant thereupon took the foregoing excep-  
 tions to the direction and ruling of the learned Judge, and insisted  
 upon the said several matters as an absolute bar to the action.

*C. Kelly* opened the exceptions, and having stated the declara-  
 tion, the evidence, the charge of the learned Judge and the exceptions,  
 submitted that the plaintiff had made two complaints:—first, the  
 diminution of the supply of head-water by lowering the level of  
 Lough Mask; secondly, causing back-water in the tail-race by means  
 of the tap-drain. In point of fact the plaintiff was benefited by the  
 works.—[PENNEFATHER, B. That is to say, that although the  
 plaintiff derived a benefit from the works, the jury have found a  
 verdict for damages.]—The first objection to the charge is, that the  
 Judge told the jury that if they believed the plaintiff was injured  
 by the works, they should find for him, although they believed the  
 works were done skilfully. Now the case of *Sharpley v. Horns-*  
*by* (a) decides that there must be want of skill, or negligence, to

(a) 4 Ir. Jur. 381; S. C. 2 Ir. Com. Law Rep. 590.

render an action maintainable.—[PENNEFATHER, B. It did not decide so: it decided that, under the circumstances of that case, negligence appearing, the plaintiff was not precluded from his Common Law remedy; but it was not decided that he would be precluded if negligence did not exist.]—That, however, is the inference to be drawn from the observations in the case.—[PIGOT, C.B. There were two questions:—first, whether the statute was mandatory, in requiring certain things to be done which had been omitted in that case; for if mandatory, their jurisdiction did not attach. Secondly, supposing the jurisdiction to have attached, were the Commissioners liable for negligence? I went fully into both questions, but decided the case on the latter ground alone.]—The decision of the question, certainly, was not necessary in that case.—[Counsel admitted that the declaration pursuant to the 5 & 6 Vic., c. 89, s. 33, was not served upon the plaintiff, but relied on the “final notice,” proved by the production of the *Gazette*, as precluding that question, and conclusive in respect of all preliminaries, by virtue of the 38th section of that Act.]—But assume the question not to be precluded, the declaration was unnecessary in this case, for two reasons: first, that it is not such an interference with a mill as is contemplated in section 33; secondly, if it be so, the 33rd section is not applicable to summary proceedings under 9 Vic., c. 4, and 10 & 11 Vic., c. 79, under which Acts these proceedings were taken. The sections 29, 30, 31, 32 and 33, are those of the 5 & 6 Vic., referring to mills—[read them.]—The interference with mills must be direct, to make the declaration necessary.—[PENNEFATHER, B. There is a direct interference here both with the head-race and the tail-race. Suppose the supply was cut off altogether, or the tail-race so interfered with as to prevent the mill being worked at all, would not that be interference?—PIGOT, C. B. By the 52nd section, rights are given to the mill-owner, which he could not avail himself of if he did not get notice.]—That section gives remedies to every person affected; still all persons are not entitled to be served with the declaration. The interference must be with the mill or its works, to be direct: here it is consequential.—[GREENE, B. Yet the words “at or in respect of” are used in the

T. T. 1853.  
*Exchequer.*  
 MALLEY  
 v.  
 HORNSBY.



T. T. 1853. Act of Parliament.]—If the Act be extended to consequential interference, it might embrace a district of fifty miles in extent.—  
Exchequer.  
**MALLEY**  
**v.**  
**HORNSBY.** [PENNEFATHER, B. I think if a mill at a distance of several miles from the works be affected by the drainage, the owner should get notice.]—By the provisions for summary proceedings contained in the 9 Vic., c. 4, and commencing with section 45, a declaration is not necessary to be served.—[PENNEFATHER, B. Had you the assent of half the proprietors, in conformity with the 48th section of that Act? ]—The final notice is conclusive as to all preliminaries by the 18th section, with respect to works under that Act, and the final notice in this case was served pursuant to that Act, as appears by the recital on the face of it. The right of action at Common Law is also taken away by that section of the Act. The cases on the subject are very fully collected in the case of *Sharpley v. Hornsby* (a), recently discussed and decided on in this Court.

*George O'Malley* (with *Fitzgibbon*), contra.

This case differs from the case of *Sharpley v. Hornsby* (b) in this respect, that neither negligence, excess or arbitrary conduct are complained of in express terms; but the complaint is, that the Commissioners wrongfully and unjustly did certain acts: however, the question to be decided by the Court is, whether the Judge was justified in allowing the case to go to the jury upon the evidence of damage. These works were executed under the provisions of 5 & 6 Vic., c. 89, passed in the year 1842; by the 3rd section of which persons interested in any land liable to be flooded, or otherwise injured by water, &c., were to apply by memorial to the Commissioners for the execution of that Act, praying that their land might be drained, or the drainage improved, who, by the 8th section, were bound to appoint an engineer, or other competent person, to make a survey of the land or river referred to in the memorial, and report thereon; and by the 10th section, the Commissioners, if they deem it inexpedient that the land or river should be drained or improved, by reason of the benefits likely to arise not being commensurate with the probable cost of the works, they are to decide accordingly,

(a) 4 Ir. Jur. 381; S. C. 2 Ir. Com. Law Rep. 590.

(b) *Supra*.

and notify their determination to the memorialist; but by the 11th section, if the Commissioners approve of the work, they are to have copies of the engineer's report lodged with the Clerk of the Peace of the county where the land is situated; and then, by the 12th section, they are to cause a complete survey to be made, and proper schedules, maps, plans and sections to be prepared, and copies thereof to be deposited in some convenient place for public inspection. By the 13th section it is enacted, that "In all cases where it shall be proposed to take or remove any mill or factory, a copy of such notice shall be served on the owner, lessee or occupier, or person in charge of such mill or factory, or posted on the door or wall thereof." By the 16th section, a meeting of the persons interested is to be called by the Commissioners, who, by the 17th section, shall hear objections to the schedules, and other matters there mentioned, and cause such alterations, if any, to be made in them as upon consideration they shall deem expedient. By the 33rd section, the Commissioners are required to make a declaration, stating the names of the assenting proprietors, and certain particulars respecting the lands to be drained; and also "in case any mill or factory, or any weir, &c., belonging to or connected with any mill or factory, shall cause flooding, so as thereby to injure or prevent the improvement of such land as aforesaid, it shall be stated in such declaration that such mill or factory, &c., causes the flooding, &c., whether such injury, &c., be to an extent in value or exceeding three times the value of such mill or factory;" and if the injury be less than three times the value of the mill, it shall be stated in the declaration, "whether the flooding of said lands cannot be remedied without altering any such dam, weir," &c.; and also "the amount of the actual working water-power of such mill or factory, and the level of the water at which the amount of working water-power theretofore enjoyed by such mill or factory can be secured;" and copies of such declaration shall be printed and deposited with the Clerk of the Peace, and (when any navigation shall be affected by the works), with the secretary of the grand jury, and in such other places as the Commissioners shall think fit; and in case a mill or factory is to be interfered with, the Commissioners

T. T. 1853.

Exchequer.

MALLEY

v.

HORNSEY.

T. T. 1853.  
*Exchequer.*  
MALLEY  
v.  
HORNSBY.

shall cause a copy of the declaration to be delivered to the owner or occupier, or to his clerk, agent or servant superintending the same, together with a written description of such parts of the proposed works as are intended to be executed in respect of such mill or factory: and when these several preliminary measures have been complied with, the Commissioners are, by the 37th section, to give a final notice thereof, and publish a copy of it in *The Dublin Gazette*, and in a local newspaper, and post it in the place for posting grand jury notices; and by the 38th section, the publication of such final notice is made conclusive evidence of the due performance of the several preliminary measures: "and after such publication, it shall not be lawful for any person to question any thing done or omitted to be done by the said Commissioners, under any of the powers hereinbefore contained, save only by such petition to the Court of Chancery or Exchequer as aforesaid." The words "hereinbefore contained" show clearly that the 38th section only restricted the legal remedies, in reference to preliminary measures, which the Act alone deals with up to that section. The proceedings were abridged by the 9 *Vic.*, c. 4, but not dispensed with, save in certain cases; but one survey is required, and the other preliminary proceedings shortened: section 8, length of time required by former Acts for giving notices, and doing other acts, reduced in certain cases. The object of these Acts was to improve the land by the diminution of the surface water, and so to benefit land-owners; and as the effect of that operation might be to injure mill-owners, the greatest care was taken throughout these Acts to protect the millers from injury to their working water-power. Thus, by the 5 & 6 *Vic.*, c. 89, s. 10, there was to be a report; by section 11, copies of the report lodged for inspection; section 12, schedules and maps to be made and deposited; section 13, notice then to be served on mill-owners. The word "modified," in that section, showed the importance of the schedules and plans being deposited, and notice served; and in this case, it appeared on the evidence of Mr. Roberts that the plans had been departed from—the original plans, if carried out, might possibly have been a benefit to the plaintiff. The 16th section provides for the consideration of



objections to the plans. By the 29th section, there is a direct prohibition against the reduction of the water-power; it provides, that where alterations in the construction of a mill-dam are made to prevent flooding, that the supply of water sufficient for securing the amount of working water-power, theretofore enjoyed by any such mill or factory, shall not be thereby lessened; and this, either directly or indirectly, as in *Sharpley v. Hornsby* (a), where it may be necessary to change the position of the machinery of the mill (section 30); and where the weir, or other works connected with a mill, shall cause injury to the extent of three times the value of the mill, the Commissioners are authorised to take it at a valuation (section 31). The declaration then required by the Act is to be personally served on the mill-owner (section 33), and here personal service is first introduced in the Act. The object is two-fold—that the mill-owner may suggest alterations, or that he may appeal to the Assistant-Barrister, if aggrieved (section 35). An appeal petition to the Court of Chancery or Exchequer is given, in case of mills and factories only, for the decision of the Barrister (section 36); and that petition is distinct from the summary petition given by the 52nd section, and is the petition referred to in 9 *Vic.*, c. 4, s. 18: and it is to be observed, that the former power of appeal, that is, to the Barrister, is reserved by the 9 *Vic.*, c. 4, s. 15, in the cases of mills and factories only. That shows that the Act did not dispense with notice or the other preliminaries necessary for the protection of millers. The final notice was published in 1847. The action was brought for injuries done in 1861, so that the remedy by appeal could only refer to the works of procedure, to which alone the remedy could be applied. The Master of the Rolls, in *Stubber v. Hornsby* (b), and *Foster v. Hornsby* (c), took that view of the 38th section of the first Act, and the 18th section of the other Act, and expressed his concurrence with the views taken by this Court in *Sharpley v. Hornsby* (d). Looking to the frame of the Act, there are preliminaries alone to the 38th section; from the

T. T. 1853.  
*Exchequer.*  
MALLEY  
v.  
HORNSBY.

(a) *Supra.*

(b) 2 Ir. Ch. Rep. 449.

(c) 2 Ir. Ch. Rep. 428.

(d) *Supra.*

T. T. 1853. 38th to the 54th section, there are the provisions which regulate the carrying on of the works to be constructed. The words, "the provisions herein before contained," in the 38th section of the first Act, must therefore refer to the preliminaries—the 18th section of the last Act, it is submitted, clearly referring to matters *ejusdem generis*, applies also to preliminary matters. The right of appeal, given by the 18th section, is the right of appeal given by the former Act against the decision of the Assistant-Barrister, and not to the right of appeal given by the 52nd section, which is one of a summary nature, given to prevent an injurious work, or obtain redress for it, and not applicable to matters of procedure.—[Pigot, C. B. Has the injury resulted from the drainage or navigation works?—[Walker, for plaintiff. From the drainage works, which are not yet completed, and by which, when finished, the plaintiff will be benefited.]—[Pigot, C. B. The action is a possessory one, and it is no answer to an injury to the party in possession, that at some future period the occupier will be served.]—Compensation, where lands have been injured, is given under sections 64 to 73; but the right of appeal there given is quite distinct from the appeal given in the case of mills or factories.—[Greene, B. The 52nd section gives the power of appeal to Chancery or Exchequer, only in cases of acts not authorised by the Act, and not to acts done in pursuance of the Act.]—The 141st section recognises in terms the right of bringing actions against the Commissioners. The first portion of the 9 Vic, c. 4, contemplates the continuation of the preliminaries of the 5 & 6 Vic. The second portion, called the summary proceedings, contemplates the dispensing with some of them, for limited objects, reciting the necessity of expediting drainage proceedings, on account of the failure of the potato crop in Ireland; and that for a limited time some of the preliminary proceedings should be omitted, but the summary proceedings are limited to drainage, and do not extend to navigation; the present proceedings, being for drainage and navigation purposes, cannot come within its provisions. The Commissioners had no authority to make the canal, under the summary proceedings, part of this act. They cannot justify the injury, on

the plea of making a navigable canal, which was done without authority. Taking the entire of 5 & 6 Vic., and 9 Vic., they contemplate that the Commissioners are in no case to reduce the water-power of any mill. They did not take away the Common Law right of the mill-owner to retain his water-power. The declaration complains, that "wrongfully and unjustly" the Commissioners violated the Common Law right of the plaintiff,—the form of the declaration the same as in the case of *Boulton v. Crowther* (a).—[PENNEFATHER, B. The form of the declaration is not complained of.]—In that case it was held that the trustees of a road, acting under a certain Turnpike Act, were not liable to an action for consequential injury resulting from an act which they were authorised to do, unless in doing it they acted arbitrarily, carelessly or oppressively; but that they would be liable for the consequences of an act not authorised. In *Turner v. The Sheffield and Rotherham Railway Company* (b), an action was brought by a reversioner, for injury done by the obstruction of lights, and creating dust, by the defendants, who relied on their Act as protecting them. Parke, B., in giving judgment for the plaintiff says, "We think the defendants were not authorised, and that the plaintiff is entitled to our judgment;" also "as this house was erected before November 30, 1835, the Company should have considered, before the Act was passed, whether the construction of any of these works would have been injurious to it, and caused it to be inserted in the schedule; it was the fault of the Company to omit it, and they must suffer for the omission; and as they cannot now be permitted to purchase the house directly without the owner's consent, so they cannot be allowed to buy it indirectly, by causing its lights to be obstructed, and then leaving the owner to receive compensation under the Act." In *The Queen v. The Eastern Counties Railway Company* (c), where the Company's Act made provision for giving compensation for injury done to persons owning any land taken by the Company, its provisions were held to extend to a case where the land of a party

T. T. 1853.  
*Exchequer.*  
 MALLEY  
 v.  
 HORNSBY.

(a) 2 B. & C. 708.

(b) 10 M. & W. 425.

(c) 1 Gale & Dav. 589.

T. T. 1853. had not been taken by the Company, but was injuriously affected by their lowering a road in part of the land in question.

*Escheyner.*  
MALLEY  
v.  
HORNSBY.

In *Collinson v. The Newcastle and Darlington Railway Co.* (a), the Act provided that "every such penalty or forfeiture may be recovered by summary proceedings, upon complaint made before two or more Justices of the Peace;" and it was contended that the penalties incurred should be so enforced. But Cresswell, J., says:—"You read the word 'may,' as if it were 'must;' but besides this, no express remedies need be provided, in order to entitle a party to sue for penalties imposed by Act of Parliament; your argument therefore does not apply:" thus holding that the remedy was cumulative, and the Common Law remedy was concurrent—a principle which it is submitted must rule the present case.

Also in *Sharp v. Warren* (b), it was held that where an Act of Parliament gives a summary remedy against defaulters, though in terms apparently prescribing such remedy, that remedy was cumulative, and did not take away the previous right to sue by action at law.—[PENNEFATHER, B. We decided, in *Sharpley v. Hornsby*, that the 52nd section did not take away the Common Law right, which is in conformity with the principle of those cases.—PIGOT, C. B. And that decision has since received the sanction of the Master of the Rolls.]—Even though there was not carelessness on the part of the Commissioners, they are liable for the injury done.—[PIGOT, C. B. Suppose, to put an extreme case, they made a canal which rushed directly on the mill, and carried it away, can that be justified?—The Commissioners must carry the principle to that extent; but they are prohibited from lessening the water-power: still they have done so, and that is carelessness.—PIGOT, C. B. You rely not on the carelessness of the Commissioners as the gravamen of the injury, but on your Common Law right to redress for an injury; and your argument is, that if they rely on their powers under the Act, they must show that they acted properly and in conformity with its provisions.]—That is our argument. As to the alleged ultimate benefit to the plaintiff, he

(a) 1 Car. & Kir. 546.

(b) 6 Price, 131.

may not then enjoy this property; and the right to the use of water is thus expounded by Sir John Leach, in *Wright v. Howard* (a):—

“The right to the use of water rests on clear and settled principles. *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in water.” Again:—“Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back on the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either have an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant.”

T. T. 1853.  
*Exchequer.*  
**MALLEY**  
*v.*  
**HORNSEY.**

The authority of that case is expressly recognised and approved of in *Mason v. Hill* (b).—[PENNEFATHER, B. The difficulty is on the 38th section. Does the final notice protect the defendant? or would you contend that if the declaration had been served on the plaintiff, that still he might have brought his action?—Yes, if the declaration had been served: he might have had it altered, or appealed against it, and if he neglected to do either, he could not complain of the declaration; but suppose they injured him by lessening his water-power, his action would lie.—[GREENE, B. Your argument is that they were not authorised to lessen the water-power, and the Act cannot, therefore, protect them.—PIGOT, C. B. The words “hereinbefore mentioned” do not apply to by far the greater number of acts to be done, and if the section was made to embrace them, far the greater number of the acts of the parties would be without a remedy.]—Counsel referred again to the injury sustained, but the Court intimated that the jury had awarded damages to the plaintiff; and that the evidence appeared quite sufficient to support that finding.

(a) 1 Sim. & St. 190.

(b) 3 B. & A. 304.



T. T. 1853.

Exchequer.

MALLEY

v.

HORNSBY.

*R. C. Walker*, in reply.

He relied strongly on the words of 9 *Vic.*, c. 4, s. 18—"Nor any other matter or thing done or omitted to be done by the said Commissioners, previously or subsequently to the publishing of such final notice," shall invalidate any of the proceedings under the recited Acts or that Act. That the omission, therefore, of the declaration, if necessary, could not invalidate their proceedings, or prevent their jurisdiction from attaching. The action at law is taken away by express negative words in the latter part of that section, in which it is enacted, that it "shall not be lawful for any person whatever in any manner to question, &c., any thing whatsoever done or omitted to be done by the Commissioners under the provisions of the said recited Acts, or this Act, save only by such petition to the Court of Chancery or Exchequer as by the first recited Act is allowed in case of appeals respecting mills or factories only." The petition there referred to is the petition authorised by the 52nd section.

*Cur. ad. vult.*


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 FIGOT, C. B.

June 11.

We are all of opinion that the exceptions taken to the charge of the learned Judge who tried this case must be overruled. It is unnecessary now to recapitulate the evidence given at the trial; it is sufficient to state generally the injury complained of in the declaration, and the case made on the part of the plaintiff below. The action, as appears from the declaration, was brought for injuries to the plaintiff's mill, arising from one or both of two causes: namely, the lessening of the supply of the head-water that worked the plaintiff's mill, which as I understand would follow as a result from lowering the level of the lake that supplied the head-water; and by throwing back-water on the wheel of the mill, by reason of a tap-drain, carried by the Commissioness of Drainage into the tail-race of the plaintiff's mill. Evidence was given at the trial to establish both these injuries. In the bill of exceptions, however, there is no point presented as having been made in reference to either of those injuries, as distinguished from the other: a general

verdict for £200 was found for the plaintiff, and the objections pointed by the bill of exceptions went to the charge of the learned Judge, in reference to the entire action. As to the nature of the action, there is no count in the declaration complaining that the Commissioners were guilty of negligence in the execution of the works; and the case rests solely on the ground that it was proved at the trial that the Commissioners were guilty of exceeding their jurisdiction, and that the plaintiff was therefore entitled to a verdict, awarding him compensation for the injury his mill had sustained. The Commissioners resisted the action, on the grounds, first, that they were acting in the exercise of their jurisdiction, and that acting within it, and without negligence (which was not alleged, as I have already stated, by the plaintiff), the action could not be maintained; and secondly they relied, as in the case of *Sharpley v. Hornsby (a)*, on the provisions of the 9 Vic., c. 4, s. 18, and contended that the final notice mentioned in that section must be taken as concluding all question as to their previous proceedings; and also that the Common Law remedy by action was taken away by that section. They also relied upon that portion of the same Act entitled "provisions for summary proceedings," and alleged that the provisions regulating summary proceedings dispensed with the necessity of doing those preliminary acts that the plaintiff contended were requisite in order to confer jurisdiction on the Commissioners to undertake the works. The first question I shall consider is whether, exclusively of the 18th section of the 9 Vic. c. 4, and the provisions for summary proceedings contained in that Act, there be sufficient in the case to establish the proposition that the Commissioners have done any thing which, if not cured by that section and those provisions, was an act done by them without authority and in excess of their jurisdiction? In the case of *Sharpley v. Hornsby* the same question arose in a different shape, but it was not there necessary positively to decide it. In that case there were two sets of counts—one alleging that even although the Commissioners had jurisdiction, an injury having been done to the plaintiff by their negligence in the execution of the works, they were liable to an action at Common Law; and the other set of counts was framed

T. T. 1853.  
*Exchequer.*  
 MALLEY  
 v.  
 HORNSBY.

(a) *Supra.*

T. T. 1853.  
*Exchequer.*  
MALLEY  
v.  
HORNSBY.

with a view to sustain the position that the authority conferred by the Act had not been observed by the Commissioners, and that they therefore, proceeding without jurisdiction, having injured the plaintiff, were liable to an action. It was not necessary, however, for the Court to decide in *Sharpley v. Hornsby* the question that where the Commissioners exceeded their jurisdiction an action lay. It was enough to decide that even though they established that they had acted within their jurisdiction, still, if acting within it, they were guilty of negligence in the execution of the works, they were liable to an action, at least in such cases as that which was then before the Court; in which it appeared that the persons employed by the Commissioners were not persons whom it was incumbent upon them, under the Act of Parliament, to employ, but persons selected by themselves, and for whose conduct they were therefore responsible. I went minutely through the Acts of Parliament in that case, as the opinion I entertained was, that on both grounds the verdict should be set aside, although it was not necessary to decide the case upon one of them, viz., the want or excess of jurisdiction. I find in the report of the case my views stated, upon the construction of the several sections of the Act. I conceived the Commissioners did not possess jurisdiction in the proceedings complained of, as they had not acted in accordance with the declaration by which, in my opinion, they were bound. They might, in that case, have introduced proper terms into the declaration, in order to have acquired jurisdiction to carry on their works, but they had neglected to do so; and being bound by the terms of the declaration, they had no jurisdiction to interfere, as they had done, with the plaintiff's mill. The question of liability on the part of the Commissioners, for acts done without jurisdiction, has in the present case also arisen; but it is now necessary that the Court should positively decide it; and in going through these Acts of Parliament, I shall be obliged to traverse some of the same ground that I went over in *Sharpley v. Hornsby*. The case, however, is one of such very great importance, that it is proper that the grounds of our decision should be distinctly known to those who are to be governed in their conduct by our decisions. I shall therefore go through certain portions of the Drainage Acts,

to show that they require certain preliminary acts to be done by the Commissioners, before they can interfere with the working water-power of mills or factories. In the case now before us, the plaintiff alleges that his mill has been injuriously affected by the Commissioners, in two ways.—[His Lordship then stated minutely the several counts of the declaration (a).]—The allegations in the pleadings amount in substance, I think, to these—that the plaintiff was injured by reason of the Commissioners diminishing the amount of the working water-power of his mill; and by impeding the motion of the mill-wheel by back-water, caused by the tap-drain constructed by them. The manner in which these things occurred was this:—The mill was supplied with water in a very singular manner; it was situated between two lakes, Lough Mask and Lough Corrib, and the water from Lough Mask did not flow out of the lake in the ordinary manner, but escaped through fissures, and, running under ground for a considerable distance, rose again at a certain elevation above the plaintiff's mill, and supplied it with head-water, and having passed the mill it again sunk into the earth and flowed under ground into Lough Corrib. The Commissioners had engaged in two classes of works—one for the purpose of draining lands, and the other for the purposes of navigation, by cutting a navigable canal from Lough Mask to Lough Corrib. The result of both these operations was, as stated to us, to lower the medium level of Lough Mask. With respect to that portion of the works connected with navigation, there is nothing that appears in the evidence before us, to show that these works were authorised by the statutes, as the Drainage Acts give no authority to commence such operations *per se*, those Acts contemplating (as regards navigation) that when the drainage of lands was likely to be effected in such a way that rivers were capable of being rendered navigable, or their navigation improved, in connection with the drainage, then that work might be carried into execution, through the instrumentality of certain proceedings connected with drainage. The work might be commenced either upon the memorial of any person interested in the river adjacent to the lands to be drained, or of the secretary to the grand jury

T. T. 1853.  
*Eschequer.*  
 MALLEY  
 v.  
 HORNSBY

(a) *Vide supra.*

T. T. 1853. of the county in which such river or some part of it was situated.  
*Exchequer.*  
**MALLEY**  
*v.*  
**HORNSBY.**

With respect to the mere drainage of lands, that work was to be commenced on the memorial of the person interested in the lands proposed to be drained. In the present case, there appears upon the evidence to have been two classes of operations in progress, and under the provisions of these Acts a name was given to each district in reference to the two classes of operations ; with respect to one of them, viz., "the district of Lough Mask and the river Robe," the works appear to have been undertaken under the provisions for summary proceedings enacted by the 9 Vic. c. 4 ; but with respect to the other, viz., "the Lough Corrib, Mask and Carra district," the operations were not undertaken under the provisions for summary proceedings contained in that Act. The operations in the former district related solely to draining, but those in the latter related not only to drainage but also to navigation ; but the works which form the subject of the present controversy were works carried on in each district, and of each class. Now, such was the nature of the injury complained of in this action, and such were the classes of operations in which the Commissioners were engaged ; and the proposition that we are to consider here is this, whether or not the Commissioners, before they commenced or undertook any portion of the work calculated to do an injury to mills or factories, were bound to have taken certain steps prescribed by the Act of Parliament ? and one of these steps was the signing and publishing of a declaration which should specify what works they intended to perform, by which the water-power of the mill was likely to be affected. The question then is, whether it is essential, in order to confer upon the Commissioners a right to commence works whereby the working water-power of a mill is proposed to be interfered with, that they should previously sign and publish a declaration ? It is right to consider what is to set the Commissioners in motion. The proceedings under the Act of Parliament, as regards drainage, are simply these :—Any person interested in lands capable of being drained, or improved by drainage, may present a memorial to the Commissioners, praying that the lands may be drained or improved by drainage under the provisions of the Act ; and in case

of the improvement of navigation in connection with drainage being contemplated, a similar memorial may be presented to the Commissioners, either by any person interested in the river adjacent to the lands, or by the secretary of the grand jury of the county in which such river is situated. I shall at present deal with the case of the memorial of a person interested. The Commissioners, on receiving such memorial, are to direct some engineer or other competent person to inspect, and, if they shall deem fit, to make a survey of the lands or river intended to be improved; and, upon the report of the surveyor, the Commissioners are empowered to decide whether or not it is expedient to undertake the proposed works; and they are directed to notify, in writing, to the memorialist the decision to which they have arrived. The Commissioners are to require a deposit from memorialist, sufficient to defray the preliminary expenses; and if they deem it expedient to undertake the proposed works, they are to require a further deposit, for the purpose of meeting the expenses of making further surveys of the lands or rivers proposed to be improved, together with schedules, maps, plans and other matters prescribed to be done by the Act; and a more minute survey, if they think fit, is accordingly to be made, and schedules and plans prepared, containing a full description of the lands proposed to be drained, and the lands or other property likely to be affected by the proposed works; and these schedules and plans, when completed, are to be deposited in such convenient place as the Commissioners may think proper; and the Commissioners are to cause a notice of the places where they have been deposited to be published in some local newspaper; and, when it is proposed to improve the navigation of a river, to be served on the secretary of the grand jury of the county in which the river is situated; but when a mill is likely to be affected by the proposed works, notice is to be served upon the owner or person in charge of the mill: and by the 5 & 6 *Vic.*, c. 89, the documents so deposited were to remain for inspection during six successive weeks; but by the 9 *Vic.*, c. 4, they are required to remain only for three weeks. And all persons are to be entitled to receive copies of those documents, on payment of the costs of making them, and to have six

T. T. 1853.

Eschequer.

MALLEY

v.

HORNSBY.

T. T. 1853. *Exchequer.*  
MALLEY  
*v.*  
 HORNSBY.

weeks by the former Act, reduced to three weeks by the latter one, from the publication of the notice, to make their objections to the schedules, plans or other matters specified in the Act. That having been done, the Commissioners are required to call one or more meetings, consisting of two classes of persons—those who are proprietors or lessees of the lands which are the objects of the proposed operations, and those whose lands or property are likely to be affected by the works; and for that purpose they are empowered to fix a day or days after the expiration of the notice of the deposit of the schedules and plans; and in case of calling another meeting, by a subsequent notice, then an interval of twenty days must elapse between the serving of the subsequent notice and the holding of that meeting. At such meetings the Commissioners shall attend, and parties who are interested in the lands or river to be improved may make objections in relation to the proposed scheme; and the Commissioners are bound to hear such objections, and are empowered to receive evidence on oath upon the subject; and, having considered the objections, they are to cause such alterations as they may think expedient to be made in the schedules, plans and other documents deposited, and to sign them when so altered; and they are also charged to preserve those documents in the office in Dublin, and to deposit copies with the Clerk of the Peace of each county in which such works are proposed to be executed; and they are to remain open for public inspection at all reasonable times, upon payment of the fee of one shilling. Now, in what manner do we find provision made that the owners of mills may avail themselves of these proceedings for their protection? In the first place, upon the memorial for the purposes of drainage, or navigation connected with drainage, being presented, the engineer or other competent person must, in his preliminary report, amongst other things, report as follows:—“Whether it may be necessary or expedient for the “execution of such works to purchase, remove, injure, or alter any “weir, dam, mill, factory, or other building or property, and whether any and what improvement would or might be effected in any “existing water-power; and whether any new water-power would “or might be created in conjunction with such works, &c. . . .

“ And such engineer or other person shall report to the Commis- T. T. 1853.  
 “ sioners the nature, extent and probable expense of effecting the *Exchequer.*  
 “ purposes aforesaid, and the lands, mills, &c., to be affected by such *MALLEY*  
 “ works, and the benefit or injury likely to arise to such lands, *v.*  
 “ mills, &c., from such works and the several matters aforesaid.” *HORNSBY.*

And by the 12th section, which directs a more minute survey and further inquiries as to the lands and other property, the engineer is directed to report the probable amount of money payable, amongst other things, for the purchase of any mills or other property required to be purchased for the purpose of such works; and the 13th section, in providing for the publication of the notice of the deposit of the schedules and maps, as in reference to the owners of mills or factories, contains an especial provision as follows :—“ And in all “ cases where it shall be proposed to take or remove any mill or fac- “ tory, or to lower, raise, or modify any weir, dam, or other work “ or obstruction connected with any mill or factory, a copy of such “ notice shall be served on the owner, lessee, or occupier, or person “ in charge of such mill or factory, or posted on the door or wall “ thereof; and by such notice all parties interested shall be required, “ on or before a day to be therein named, not sooner than six weeks “ from such publication, &c., to transmit to the secretary of the said “ Commissioners their objections, if any, to such schedules, maps, “ plans, sections and estimates, and all other objections which such “ parties shall think fit to make, with respect to any thing proposed “ to be done by the said Commissioners under the provisions of this “ Act.” Now, with reference to the lands to be drained, the Legis- lature considered that it would be for the benefit of the owners of lands, that the consent of a portion of them should bind the rest; and these proceedings, as to the owners of lands thus to be bene- fited, are provided for by the machinery of the Act; the Commis- sioners are empowered to hold meetings and make inquiries for the purpose of ascertaining whether a sufficient assent has been ob- tained: but it is plain, that although the owners of lands proposed to be drained must be aware of the contemplated works, and alive to all that is going on, yet that the owner of a mill which may derive its supply of water from a remote locality (as in the present



T. T. 1853.  
*Erchequer.*  
**MALLEY**  
 v.  
**HORNSBY.**

case, from a lake three miles distant) may be utterly ignorant of the improvement contemplated in that locality, and of the proceedings as to the lands, about which he is wholly uninterested. Accordingly, the mill-owners being no parties to the proceedings, it is obligatory on the Commissioners, as soon as the first inquiry is made and perfected, and the mill-owners likely to be affected by the proposed operations ascertained, not merely as in reference to the owners of lands, to lodge a copy of the notice of the deposit of the schedules and maps with the secretary of the grand jury, or send a copy for publication to some local newspaper, but also to give distinct and specific notice to the owners of mills of the matters I have mentioned. That having been done, a meeting of the persons interested is to be called, under the provisions of the 16th section, and the proceedings at that meeting are regulated by the 17th section, which, after requiring the Commissioners to attend and hear and inquire into objections on the part of all persons interested in the lands or river to be improved, proceeds thus:—"And also unto all such objections as shall have been made, "or shall then and there be made, by or on behalf of the owner, "lessee or occupier, or other persons interested in any mill or "factory likely to be affected by any thing proposed to be done "by the Commissioners, &c. ; and after having considered all such "objections as aforesaid, they shall cause such alterations (if any) "as they shall deem expedient to be made in the schedule, &c., "and shall sign the same;" and the Commissioners are also by that section directed to receive evidence on the matters before them. What is the legal effect of what I have now read? The Commissioners are, to a certain degree, constituted a Court in themselves, with power to receive evidence upon oath; and having heard the testimony of the witnesses, it is obligatory on them to decide upon the objections of the parties, upon whom they are bound to serve notice—that is to say, upon all those who are likely to be affected by the proposed operations; and the effect then of these sections is, that before the Commissioners shall assume the jurisdiction conferred upon them by section 17, they shall bring the mill-owners within their jurisdiction, by serving them

with this notice, in the manner prescribed by the 13th section. T. T. 1853.  
The next proceeding that the Commissioners are called on to adopt is the making of a declaration, and that is to be made under section 33, after the assent of two-thirds of the proprietors has been obtained. What the declaration is required to contain is set forth with great particularity in that section.—[His Lordship read the section, so far as it prescribed what the declaration should contain.]—And by that section it was directed, “That in all cases, when it is proposed to interfere with any mill or factory, &c., the said Commissioners shall deliver, or cause to be delivered to the owner or occupier of any such mill or factory, or to his clerk, agent or servant, superintending the same, a copy or duplicate of such declaration as aforesaid, together with a written description of such parts of the proposed works as shall be intended to be executed at or in respect of such mill or factory; and all persons may inspect,” &c. It was these latter words that raised one of the questions in *Sharpley v. Hornsby* (a). The delivery of this document is to follow the deposit of the schedules, maps and other documents, as provided for by section 12. But before the Legislature proceeded by section 33 to declare what were to be the contents of this declaration in ordinary cases, they made by section 22 a provision that it is important to notice: it is enacted by that section, “That no work for the improvement of the navigation of any such river, or part of a river as aforesaid, shall be commenced, unless a declaration, as hereinbefore mentioned, shall have been made at the presentment session or sessions of the barony or half barony, &c., approving of the proposed works,” &c. Thus, that section, dealing with another class of persons, not directly interested in the drainage, namely the inhabitants of counties, provides, that before any thing is done in reference to a river in which they are interested, a declaration should be made by them, approving of such works. Section 29 is the first containing any particular provision with respect to mills, and it enacts, “That in cases where, from the damming up of any river or stream, by weir, dam or other obstruction, of any mill or factory, occasional damage may arise, by the overflowing of such

*Eschequer.*  
MALLEY  
v.  
HORNSBY.

(a) *Supra*.

T. T. 1853.

*Exchequer.*

MALLEY

v.

HORNSBY.

"river or stream, it shall be lawful for the said Commissioners to  
"construct any reservoir, &c., or back-drain, and to erect any flood-  
"gates, &c., and to make any alterations in the dams, &c., con-  
"nected with such mills or factories, which shall be necessary to  
"prevent the ill consequences, &c.: but always so, that the sup-  
"ply of water sufficient for securing the amount of working water-  
"power, theretofore enjoyed by such mill or factory, shall not be  
"thereby lessened," &c. Now, by reference to the interpretation  
clause, it appears that the word, "river" shall extend to all  
rivers, lakes, canals, streams and estuaries; therefore in sec-  
tion 29, reading "lake" for "river," we have an enactment, that  
the Commissioners may, where damage arises from the overflowing  
of any lake, construct a back-drain. Now, that is exactly what  
the Commissioners have done in this case. The lake from which  
the plaintiff's mill was supplied with water caused occasional  
damage by overflowing, and to prevent that, a back-drain was  
made by the Commissioners; and it was that canal which, passing  
by the plaintiff's mill, carried off a considerable quantity of the  
water that otherwise would have flowed as head-water to the  
wheel. It is clear the Commissioners were acting under the pro-  
visions of this section; but the Commissioners were required to  
perform that work in such a manner, that "the supply of water  
"sufficient for securing the amount of working water-power, there-  
"tofore enjoyed by any such mill or factory, shall not be thereby  
"lessened;" and it was also provided, that "the level of the  
"water, at which such amount of working water-power shall be  
"secured, shall be previously inquired into and ascertained by the  
"said Commissioners; and all persons interested in any such mill  
"or factory, or in any land to be drained as aforesaid, shall be  
"at liberty to object to the level, &c.; and the Commissioners  
"shall hear and decide upon all such objections, and declare what  
"such level shall be, and shall state the same in the declaration  
"hereinafter directed to be made by the said Commissioners," &c.  
Thus, the mill-owners and land-owners shall have an opportunity  
of objecting to the level ascertained by the Commissioners, and of  
having a decision upon their objections, and then the level deter-

mined upon by the Commissioners shall be declared, and a statement of it inserted in their declaration. Then section 32, in dealing with the mill-owners who are not original parties to these proceedings (and the provisions of which are very analogous to those of section 22, dealing with grand juries, who, like mill-owners, are not original parties), provides that before the Commissioners shall proceed to take any mill, under the provisions of the preceding section, or to affect any "constructions, erections, lowering, raising or alteration," the Commissioners shall insert in the declaration such statement as to these several matters as they are directed to make by section 33, in cases where any mill or factory is proposed to be interfered with. If the statute stopped there, it would appear quite clear to me that before the Commissioners could enter into any investigation of these matters, at the meeting of the persons interested, a report should have been made, and that before doing any thing further, the mill-owners should have had an opportunity not only of ascertaining what was proposed to be done, but also of being heard on their own behalf; then there should have been, by the Commissioners, a distinct adjudication, or what is called in the statute "a declaration" of what the works were that they intended to institute. But if any doubt remained on this part of the subject, it is removed by section 35, which shows the species of relief intended to be given against acts of that Court (of the Commissioners), viz., by appeal to the Assistant-Barrister against their declaration; and by section 36, a further appeal is given from the decision of the Assistant-Barrister to the Courts of Chancery or Exchequer, and the appeal is given not only against any act of the Commissioners, but against any thing proposed to be done, and a power is given to the Courts of Chancery and Exchequer, not given to the Assistant-Barrister, of making any alteration in the scheme of the Commissioners that may be deemed just. Nothing can be plainer than the legislation of these sections. A right of appeal is given, and that not against what is done, but what is proposed to be done. The declaration of the Commissioners must be made, in order to give the party aggrieved an opportunity of making that appeal, and of obtaining that redress which he could not obtain unless that

T. T. 1853  
*Exchequer.*  
MALLEY  
v.  
HORNSBY

T. T. 1853.  
*Eschequer.*  
**MALLEY**  
*v.*  
**HORNSBY.**

declaration were made. The sections of the Act bearing upon this subject are numerous, but not perplexed. They cannot be misunderstood, for the Legislature appears to have most elaborately provided that the Commissioners shall have no authority to interfere with the property of mill-owners, except in strict compliance with the terms prescribed. Where the Commissioners fail to observe these provisions, they act in transgression of the enactments of the Legislature, and their proceedings must be regarded as it were *coram non Judice*. There are other sections of the Act showing that the Legislature had this object in view, but it would be overlabouring the case to refer to them all. This was the conclusion at which I arrived when the case of *Sharpley v. Hornsby* was before us, although there it was not necessary to decide the question of jurisdiction; but I entertained no doubt upon it then, nor do I now, when it has become necessary for the Court to decide it. In that case a declaration was made by the Commissioners, but it omitted certain statements that it should have contained. The proceedings were not adapted to the declaration.

In the present case no declaration at all has been made, and thus the Commissioners have failed to perform one of the most essential acts connected with their office, and injury has been alleged in the declaration, and found by the jury.

The next question is, whether there is any thing in 9 *Vic. c. 4, s. 18*, that exempts the Commissioners from liability in this case, and whether final notice precludes all questions as to these preliminary matters being performed? Now I confess it appears to me that any person not accustomed to legal ingenuity would be astonished to hear such a proposition; and regarding the latter Act, it is the last thing I should conceive, that the Legislature intended to confer powers so absolute upon any public body. It has been said that the Commissioners are persons of very high character and very great ability; but still, admitting their character to be ever so excellent, it would not be safe to entrust any public officers with authority so great, and it certainly was not intended to do so; for although I feel confident that their object is to benefit the public, yet it is necessary for them, in most of their proceedings, to act by

deputy—they could not accomplish their works otherwise; and therefore, as they must be guided in their conduct by the information received from those persons who act under them, they could not exercise that impartiality and justice which must be expected from persons entrusted with such powers. These works are precisely of that nature which rendered it necessary that the provisions of these statutes should be strictly followed by the Commissioners, and that persons who might be interfered with should be apprised of the proceedings, and have an opportunity of guarding their properties against any ill effects from the operations of the Commissioners, in the manner provided for them by these Acts of Parliament. There should be the most ample power for persons interested to make their complaints. If they neglect the opportunity when it has been afforded to them, I express no opinion how they will be affected, but it would be monstrous if the Commissioners could say with effect, as they have said here—We have abstained purposely from making this declaration—we were not bound to make it, but we have now published a notice in the *Gazette*, and that shall be final and conclusive. Such is the nature of the defence in the present case. Such a proposition as that which has been adduced is most startling; and unless the words of the statute were perfectly clear, I never could imagine that it was the intention of the Legislature that any thing so unjust should be effected, as that, under the pretext of affording security, they should remove all possibility of remedy. The question is, did or did not the 9 *Vic.*, c. 4. s. 18, protect the Commissioners from responsibility, and exclude all controversy? It is unnecessary for me now to state why I am of opinion that the jurisdiction at Common Law is not taken away; that I have already done, in *Sharpley v. Hornsby*: and the proposition is one that applies as well in case of negligence as in case of excess of jurisdiction, for section 18 regarded matters of procedure alone, and therefore was applicable to proceedings of a formal nature, and not to those essential for the purpose of conferring jurisdiction. If it were necessary that the Commissioners should make this declaration, so as to create jurisdiction in themselves, that would not be matter of procedure, and we have already decided that the final notice did not create any such jurisdiction.

T. T. 1853.

Exchequer.

MALLEY

v.

HORNSBY.

T. T. 1853. Section 38 of the 5 & 6 *Vic.*, c. 89, applies to the same things as section 18 of the 9 *Vic.*, c. 4. Since the case of *Sharpley v. Hornsby* was decided in this Court, two cases somewhat similar have come before the Master of the Rolls, and although not yet reported (a), I have ascertained that the decision of that eminent Judge was in conformity with the decision of this Court. The question, it is true, arose in a Court of Equity, but if this answer to an action at law be a good one, it would also be a good answer to a suit in a Court of Equity, and I must say that the opinion of the Master of the Rolls, either upon a question of Common Law or of Equity, is one of the highest authority. After these two decisions, and the judgment of this Court upon a former occasion, it is not necessary to repeat our reasons upon this part of the case.

*Eschequer.*  
MALLEY  
v.  
HORNSBY.

The only other point that has been relied upon by the Commissioners is, that by virtue of that portion of the second statute which referred to summary proceedings, they were relieved from the obligation of doing any of these things rendered necessary by the first statute, in order to confer jurisdiction upon them, and on that ground that they were justified, if they thought fit, in withholding the declaration, and in proceeding without observing any of the requirements of the 5 & 6 *Vic.*, c. 89. This, I conceive is, if possible, a plainer case than the other—and upon these grounds, that the portion of the 9 *Vic.*, c. 4 (namely, from section 45 to the end of the statute), which provides for summary proceedings, does not refer at all to mills or factories, or to any thing but the drainage, and improvement of the drainage of lands; and the statute is framed in such a manner as to show that the Legislature did not contemplate any relaxation of the strictness of the provisions relating to mill-owners and grand juries; but on the contrary rendered it, in express terms, obligatory on the Commissioners to adopt those measures for the purpose of obtaining jurisdiction to act in such cases. The 45th section of the latter Act sets forth the reasons why these summary powers were conferred upon the Commissioners by the Legislature. It recites, that by reason of the failure of the potato crop of the last season (b) in Ireland, it

(a) Since reported; see *supra*, p. 401.

(b) The Act bears date the 5th of March 1846.

was apprehended that great distress would prevail in certain districts during the ensuing Spring and Summer, among the labouring classes of the poor, and that it was expedient therefore, by powers of a summary nature, to give for part of that year increased facilities and powers for carrying on works of utility connected with the drainage of lands in such districts, whereby remunerative employment might be afforded to the labouring classes. That was the object of these provisions for summary proceedings, and they were to remain in force for a limited period—that is, only in reference to works, to the execution of which the assents of the proprietors of the lands affected should have been obtained before the 1st of August 1847. In order to effectuate the object contemplated, it was provided that certain proceedings at meetings should be dispensed with; also, the making of certain inquiries, and the preparation of maps and plans that were hitherto requisite. Thus, the Commissioners were enabled by the Legislature to set the labouring population to work without delay, wherever the provisions for summary proceedings were applicable. The 46th section commences thus, “that for the purpose of such summary proceedings,” &c. The word “such” shows that this portion of the statute dealt only with those matters to which the provisions for summary proceedings applied. The 47th section contemplates two things—a memorial, presented under the preceding Act, but not acted upon; and a memorial to be presented under the 46th section of the latter Act, and to be acted upon before the 1st of August 1847. The Commissioners are then to inquire into certain things—“the extent of the lands to be drained or improved, “the probable costs and-expenses of such drainage or improvements, “and the probable benefit to result therefrom; together with the “names of the proprietors of the lands to be so drained or improved;” but not one word is said as to collateral proceedings and inquiries, regarding mills and factories; these inquiries alone, that I have mentioned, being contemplated, before the drainage works were to be commenced; and the Commissioners having procured a report from their engineer upon these points, they are required, if they approve of the works, to cause a copy of the

T. T. 1853.  
*Exchequer.*  
 MALLEY  
 v.  
 HORNSBY.



T. T. 1853. *Exchequer.*  
MALLEY  
v.  
HORNSEBY.

report, and of their opinion thereon, to be lodged in a suitable place for public inspection, and to publish a notice of that fact. The 48th section prescribes what the notice is to require, namely, that the proprietors of the lands proposed to be drained or improved shall furnish, in writing, to the Commissioners, before a certain day, their assent to, or dissent from, the proposed works; and if the proprietors of more than one-half in extent of the lands shall assent, then the Commissioners shall, if they think fit, publish a final notice in *The Dublin Gazette*, stating, "that all the preliminaries required by the provisions for summary proceedings under this Act have been complied with." Now, this notice was only addressed to the proprietors of lands, and it is plain that it refers alone to the provisions for summary proceedings; and that in those proceedings the Act contemplates nothing but drainage works which might be executed without resorting to the provisions, with respect to mills and factories, contained in the former Act, unless it were also in the power of the Commissioners to comply with the latter provisions. That appears from the 49th section, which, after enacting that from the publication of the final notice, the Commissioners may proceed with the drainage works, proceeds as follows:—"And all and every the powers, authorities and privileges, vested in or given to the said Commissioners by the said recited Acts, or this Act, and the several provisions in the said Acts or this Act contained, shall and may be used and exercised by the said Commissioners, and applied, as far as the same are, or shall be, respectively applicable, to and for the purposes of the provisions for summary proceedings under this Act," &c. Now, it was not necessary to have recourse to the provisions of the other Acts, as to the owners of lands; they were only bound to comply with the provisions for summary proceedings as to them, otherwise those provisions would be insensible; but there was an obligation imposed upon them (the words "shall and may" imply an obligation), to apply the provisions of the former Acts, as regards the owners of mills and factories, where those provisions were applicable. There is, however, another answer to this argument: it appears

upon the evidence that a portion of these works, carried on by the Commissioners, was undertaken for the improvement of navigation, a purpose not contemplated at all by that portion of the enactment that conferred upon them summary powers; and that is, in my mind, a complete answer to this portion of the defendant's case. Amongst other matters that have been pressed in the argument by the plaintiff's Counsel, it was contended that, irrespective of the question whether those things necessary to be done by the Commissioners, in order to acquire jurisdiction, were or not performed, the Commissioners exceeded their jurisdiction, and acted without the authority of the Legislature, if they at all lessened the ordinary amount of the working water-power of the plaintiff's mill—that is to say, that although the report may have been made, and a proper notice served, meetings duly called, and the declaration properly framed—all the preliminaries, in short, strictly complied with, still the Commissioners would not be protected by the Act of Parliament if they caused the working water-power of the plaintiff's mill to be diminished, on the ground that they were only empowered to interfere with a mill, when they could preserve the amount of working water-power undiminished. There certainly are very strong expressions in the Act of Parliament, prohibiting any interference with the water-power of a mill; but upon that proposition it is not necessary to express any opinion: it is sufficient for the Court to decide, that the Commissioners have not done sufficient in this case to acquire jurisdiction.

T. T. 1853.

*Exchequer.*MALLEY  
v.

HORNSBY.

PENNEFATHER, B.

As this is a case of a good deal of importance, and as to which similar questions may be depending, I have thought it right to state to the parties the grounds on which I concur in the judgment pronounced by my LORD CHIEF BARON. He has very fully stated and commented on the Acts of Parliament, and it remains only for me very shortly to express the grounds on which I concur in the judgment of the Court. Attending to the provisions of the 9 *Vic.*, c. 4, it appears to me that the Legislature never intended to authorise the Commissioners to interfere in a summary way with, or lessen the

T. T. 1853.  
*Eschequer.*  
MALLEY  
v.  
HORNSBY.

supply of water to, mills or factories, and that this statute was passed with a view only of enabling them in an easier and speedier way to effect the drainage of lands, and employ the people in a time of scarcity and famine; that if the Legislature had intended that the water-power of mills and factories should be affected, without resorting to the guards so carefully provided by the former Act, it would have said so at once, and not retained provisions that are only necessary if these safeguards are to be preserved. Now, the Commissioners appear to me to have rested their defence entirely under this latter Act; they have not put their case upon the provisions of the Act of the 5 & 6 of *The Queen*; they have not made a declaration, and have not lodged one either with the Clerk of the Peace, or served one on the plaintiff, and so have been unable to avail themselves of the provisions of the last mentioned Act; but relying on the 9th of *The Queen*, they have abandoned any proceedings or protection under the 5th & 6th. Upon these grounds, I think the judgment of the Court ought to be with the plaintiff.

GREENE, B., concurred.

Exceptions overruled.

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E. T. 1853.  
*Exch. Cham.*

*Exchequer Chamber.*

CHADWICK v. ATKINSON.

*April 27.*

THIS case came before this Court, on a writ of error from the Court of Queen's Bench. The facts were shortly these :—The defendant had been arrested under a *capias ad satisfaciendum*, at the suit of one Fottrell, and had tendered to the Sheriff the sum marked on the writ : this the Sheriff refused to accept, unless the defendant also paid the Sheriff's poundage and expenses, which defendant declined. The defendant then applied to a Judge in chamber to be discharged from custody, on payment of the sum so tendered. The Judge made an order for his discharge, on the defendant undertaking to lodge in Court a promissory note, payable to the Sheriff, for the amount of the poundage and expenses. On this note an action was brought, and a special verdict was returned, finding the above facts.

Prior to the Common Law Procedure Act, a defendant cannot be detained under a *ca. sa.* until the poundage fees and expenses of the execution were paid, if he tendered the sum marked on the writ.

This special verdict was argued in the Queen's Bench, in Michaelmas Term 1851, and that Court were unanimously of opinion that the defendant could not be detained in custody until he had paid those fees, and accordingly gave judgment for the defendant.\*

On this judgment a writ of error was brought into this Court ; and in Easter Term 1853, the judgment of the Court of Queen's Bench was unanimously affirmed. Baron GREENE, in delivering the judgment of the Court (there being at first some difference of opinion among the members of the Court, which was subsequently removed), stated and cited authorities, establishing that at Common Law no Sheriff or public officer was entitled to claim fees for the discharge of his duty ; but Sheriffs having, contrary to their duty, exacted fees, the Legislature had interfered to prevent this exaction. This practice however continued, and was tacitly recognised by the 10 *Car.* 1, sess. 3, c. 19 (*Ir.*) ; but he was

\* *Vide* 2 *Ir. Com. Law Rep.*, p. 37.

E. T. 1853.  
*Esch. Cham.*  
 CHADWICK  
 v.  
 ATKINSON.

of opinion that from the cases decided in England under the corresponding English Acts, no doubt could be entertained of the defendant's non-liability to those fees; and unless that was altered by the statute 6 *Anne*, c. 7, the law in England and Ireland remained the same. He was of opinion that there was nothing in that Act giving a right of action to the Sheriff for his fees against the defendant. The case of *Hill v. Buchanan* (a) merely decided that the statute of *Anne* did not repeal 10 *Car.* 1; and he considered the decision of *Cowper v. Gould* (b) on this point extrajudicial. The Chief Baron, in giving judgment in that case, appeared to him not to have attached to the word *levy* its proper, limited and defined meaning; for under a writ of *ca. sa.*, the Sheriff had no power to levy. "Demand" was contradistinguished from "levy"—levy being applicable to a *fi. fa.*; but "demand and receive," being applicable to all cases, it appeared to him, therefore, that the Chief Baron was mistaken in saying the Sheriff may levy poundage on a *ca. sa.* He (Baron GREENE) found no such clause in the Act: and in the importation of the word "poundage" consisted the foundation of the argument in this case. Further, the Chief Baron appeared to him to have been under a misconception, in stating that 43 *G.* 3 was a declaratory Act; but he saw nothing in it to make it declaratory, either in the enacting part or otherwise. There was no foundation therefore for saying that the defendant could be detained under a *ca. sa.* until he paid the poundage fees and expenses. In an action the Sheriff would have no right to sue the defendant for poundage; he had a fair and

(a) 1 I. T. Rep. 553.

(b) 2 Jones, 475.

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NOTE.—The Reporter has thus shortly stated the result of this case, as it would appear to have been the intention of the Legislature, in passing the Common Law Procedure Act, to have removed all doubts on the subject, and to enable the plaintiff or defendant in every case of execution, whether *ca. sa.* or *fi. fa.*, to levy the poundage fees and expenses of execution over and above the amount recovered by the judgment. The 130th section of that statute enacts, that in every case of execution, the party entitled to execution may levy the poundage fees and expenses of the execution by law payable over and above the sum recovered. This appears clear enough, and coupled with the recommendation of the Common Law Commissioners, that there should be no distinction between

proper claim for remuneration against the plaintiff, and on that principle the statute only authorised him to take fees. It was impossible to say both parties were liable. The Sheriff had not the option of saying upon whom the liability should rest; it was the party who employed the Sheriff, to execute the process, who was to pay him, unless the Legislature had expressly enacted that the other party should be liable. For these reasons, he was of opinion the judgment of the Court of Queen's Bench should be affirmed.

E. T. 1853.  
*Exch. Cham.*  
 CHADWICK  
*v.*  
 ATKINSON.

The other members of the Court concurred in opinion with GREENE, B.

Judgment affirmed.

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plaintiffs and defendants, or between one sort of execution and another. But a difficulty appears to have been created by the 139th section, to which there is no analogous section in the English Act, providing, "that a plaintiff or defendant, arrested under any writ of *ca. sa.*, shall be entitled to his discharge from such arrest, on payment or tender to the opposite party, or his attorney in the cause, or to the Sheriff or gaoler in whose custody such person may be, under such writ, of the amount directed to be levied by such writ." The form of *ca. sa.* given in the schedule to this statute only specifies the sum due for debt, costs and interest. There thus arises a conflict between the intention of the Legislature, as expressed in the 130th section, and the literal construction of the 139th section. In England, Sheriffs are not entitled to poundage fees on writs of *ca. sa.* (See 5 & 6 Vic. c. 98, s. 31).

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T. T. 1853.  
*Queen's Bench*

CUMMING v. ———

(*Queen's Bench.*)

May 26.

Where a return is good on the face of it, the Court will not compel a Sheriff to amend the return, but will leave the complainant to his remedy by action, if the matters suggested on the affidavits be triable by that form of procedure.

WHITESIDE, on behalf of the plaintiff, applied for an order that the High-sheriff of the county of ———, or his Sub or Under-sheriff, may be ordered to amend the return on the writ of *ca. sa.* issued against the defendant in this cause, and marked for the sum of £1114, by making a return of *cepi corpus* thereon, instead of the return made thereon by the Sheriff, and for the costs of the application.

The return made by the Sheriff was *non est inventus*. The motion rested on several affidavits: one, made by the plaintiff himself, stated that the defendant was Assistant-Barrister for the county of ———, and was indebted to the plaintiff in £1000 for cash lent; for which sum defendant passed his bond, with warrant of attorney for confessing judgment thereon, in the penal sum of £2000; and in the further sum of £500 for cash lent by deponent to defendant in September 1839, and for which defendant also passed his bond and warrant; and in the further sum of £500 for cash lent by deponent in the year 1842, and for which defendant also passed his bond and warrant; upon which several bonds judgment was entered in this Court; and in the further sum of £890, on foot of a signed and settled account between the defendant and deponent, in February 1849, for which also defendant gave his bond and warrant, and judgment was accordingly entered thereon in the penal sum of £1780. The affidavit further stated that there was then due on foot of these securities a sum of £4000, besides costs; and that at the time of executing said respective bonds, defendant was residing in the city of Dublin; but that for the last two years he had ceased to reside in Ireland—his residence being in England and France—whence

he came to preside at the Quarter Sessions of the county of ———, as Assistant-Barrister of said county: that by virtue of his office as Assistant-Barrister, he was in the receipt of £900 per annum, which was received at the office of the Paymaster of Civil Service, in the city of Dublin, by virtue of a power of attorney, executed by the defendant to his crier, and that, from other sources, defendant was in receipt of a large income; and that he was in the habit of coming and returning to his Sessions on Sundays to avoid arrest.

T. T. 1853.  
*Queen's Bench*  
 CUMMING  
 v.  
 ———

An affidavit was made by a Mr. Owens, to the effect that he was in the Court-house in ——— on Saturday the 8th of January last, and saw the Sub-sheriff of the county on the same day in said Court-house, seated beside the Deputy Clerk of the Peace; and that the defendant was also in said Court-house, in presence of said Sub-sheriff; and that defendant was in said town of ——— on the evening of said day, as was also the Sub-sheriff.

The Sub-sheriff, in his answering affidavit, alleged, that on Friday, the 7th day of January, about half-past five o'clock in the afternoon, a writ of *ca. sa.* in this cause was delivered to him in his office in ———, a distance of sixteen miles from the town where the defendant was then holding his Sessions ———; that on the following day he went to said town ———, and found the defendant presiding on the Bench at Sessions, where he continued until seven o'clock in the evening, when the Court was adjourned until Monday morning following. That immediately on the adjournment, defendant proceeded to his lodgings, accompanied by an orderly police-constable, who usually escorted him to and from Court; that on said Court being adjourned, deponent filled up a special warrant on said writ against defendant, and delivered same to one of his bailiffs, with directions to attend on the following Monday, and remain until the business of the Sessions was concluded, and then to arrest the defendant. That the following Monday was the nomination day of the election for a Member of Parliament for the county of ———, and deponent was obliged to attend at ———, for the purpose of opening the Court, and reading the writ of election; that he heard and believes defendant



T. T. 1853. left ——— on the following morning, being Sunday, and did not afterwards return, and that he did not see defendant since the time of the adjournment of said Court on Saturday evening, nor does he believe defendant was in the street of ——— on said evening, except when going from the Court-house to his lodgings; that he would have arrested defendant, but considered it illegal, as, from the time deponent arrived in ——— on Saturday morning, until the adjournment of the Court, defendant was engaged in the discharge of his duties as Assistant-Barrister for said county of ———.

*Queen's Bench*  
CUMMING  
v.  
—

*Whiteside*, for the motion.

A return of bankruptcy or privilege of Parliament must be special: *Impey on Sheriff*, p. 349; and so an attachment was refused against a Sheriff who returned that the defendant was insane, and could not be removed without great danger, and continued so until the return of the writ: *Cavenagh v. Collett* (a). *Molloy v. ———* (b) will be cited against this application, because there a special return was made; but the Sheriff in that case did not take upon himself to decide the question of privilege. Doubtless, in cases of privileged persons, the Sheriff should set out the special facts. Here, however, the return is false in fact, and should be amended: *Smith v. Motherwell* (c); *Reynolds v. Tresham* (d). We charge collusion between the Sheriff and the defendant.—[PERRIN, J. I think you would be prejudiced by the amendment; for if your facts be as you say, an action for a false return is clearly maintainable, if the Sheriff should have arrested the defendant.—MOORE, J. The Sheriff ought to have said the defendant was within his bailiwick; but owing to certain circumstances, which he should have specified, that he could not have his body in Court.]

*D. McCausland*, contra.

The Sheriff acted rightly in not arresting the defendant, for the Judge of even an inferior Court is privileged from arrest:

(a) 4 B. & Ald. 279.

(b) 10 Ir. Law Rep. 14.

(c) 4 Law Rec., N. S., 94.

(d) 6 Law Rec., N. S., 138.

*Alexander v. Folville* (a). An Assistant-Barrister is privileged, as well during the exercise of his civil as of his criminal jurisdiction: *Molloy v. ———* (b). If the plaintiff think the Sheriff wrong, he may try the question in an action for a false return. The sole question is, should the Sheriff have made a special return? There is no charge of neglect; and if the action for a false return were instituted, it is plain that the plaintiff could recover but nominal damages, for the Assistant-Barrister could have discharged himself. The practice in this country has always been to leave the party to his action against the Sheriff, if there be no error on the face of the return itself.

T. T. 1853.

Queen's Bench

CUMMING  
v.  
—

CRAMPTON, J.

This is an application to compel a Sheriff to make a return of *cepi corpus*, instead of one of *non est inventus*—a most serious application, and one the Court could not grant, except in a substantive proceeding. The present return is good on the face of it, but the matter suggested by the affidavits is triable in an action for a false return. These affidavits are not full or satisfactory, on one side or the other; but it is sufficient to say the case can be tried by an action against the Sheriff.

But then arises the question, should the Sheriff get the costs of this application? True, there is no positive charge of collusion, but there are circumstances exciting suspicion, that it may be possible there may have been an understanding between the defendant and the Sheriff. We therefore think it not a case for costs, and we say on the motion—no rule.

PERRIN, J.

We are required to call on the Sheriff to amend the return of *non est inventus* to this writ of *ca. sa.*, and to state he took the body of the defendant. This was formerly a common motion, made to try the question of a false or true return. The late Judge Burton fully investigated the subject, and having observed the extreme impropriety of the practice, in concurrence with Chief

(a) Sm. &amp; Bat. 202.

(b) 10 Ir. Law Rep. 14.

T. T. 1853. *Justice Bushe and Mr. Justice Jebb, the practica was altered to*  
*Queen's Bench*  
 CUMMING  
 v.

what is now the ordinary and proper course, viz., to require the Sheriff to answer the matter of the affidavit of the complainant, unless there be some informality in his return. The application now made would, if granted, be a falsehood in fact, for the defendant was not arrested; whereas if the return made by the Sheriff be false in law as well as in fact, we do the plaintiff no injury by refusing the motion, for the Sheriff will be liable in an action for a false return. If we acted otherwise, and compelled the Sheriff to return *cepi corpus*, we would be doing great injustice, for we would be fixing the Sheriff with the debt of the defendant. I agree with my Brother CRAMPTON in saying—no rule on the motion; and, owing to the want of explicitness and fulness in the Sheriff's affidavit—no costs.

MOORE, J.

I concur in the rule of the Court. I by no means adopt the notion that a Sheriff should put on record what is untrue in fact. If there be any special circumstances, they should be set out on the return—such as bankruptcy or privilege—the Sheriff averring on his return that the defendant is in his bailiwick, but owing to these special circumstances he could not arrest him.—

No rule.

June 4.

*McCausland*, on behalf of the Sheriff, moved to amend the return, by stating special facts. The affidavit to ground the motion denied collusion with defendant: *Cavenagh v. Collett* (a); *Watson on the Office of Sheriff*, pp. 92, 93.

*Morris*, contra.

Amendments are not to be allowed as matters of course. The Sheriff is now too late—he should, in the first instance, have stated the facts of the case to the Court, and, if he were under any embarrassment, the Court would have relieved him.

(a) 4 B. & Ald. 279.

*Per Curiam.*

Let the Sheriff amend the return, on payment of the costs.

T. T. 1853.

*Queen's Bench*

CUMMING

v.

Ultimately the return stood in this form :—

"I certify \_\_\_\_\_, in the annexed writ named,  
 "was, at the time of the delivery of the said writ to me, and  
 "ever since hath been and still is, the Assistant-Barrister in  
 "and for the said county of \_\_\_\_\_, duly nominated and appointed  
 "in that behalf, according to the form and provisions of the statute  
 "in that case made and provided, to wit, as Assistant-Barrister  
 "to the Justices of the Peace of our Lady the Queen, in and for  
 "the said county, at every Sessions of the Peace held for the ad-  
 "ministration of justice in criminal cases, in and for the said  
 "county of \_\_\_\_\_; and to preside and be the sole Judge on  
 "the hearing of causes by civil-bills in and for the said county,  
 "according to the statute; and I further certify, that after the  
 "delivery of the said writ to me—that is to say, from the 20th  
 "day of June 1853, and including the 25th day of June 1853,  
 "the said \_\_\_\_\_ was in the said county of \_\_\_\_\_,  
 "and within my bailiwick; but that during all that time, and each  
 "and every part thereof, the said \_\_\_\_\_ was acting as such  
 "Assistant-Barrister to the said Justices of the Peace in the  
 "administration of justice in criminal cases in and for the said  
 "county, and in presiding as Judge on the hearing of causes by  
 "civil-bill at said Quarter Sessions in and for the said county, and  
 "therefore could not, during the said time last aforesaid, take or  
 "arrest the said \_\_\_\_\_, as by the said writ I am com-  
 "manded; and I further certify, that save as aforesaid, and during  
 "the time aforesaid, the said \_\_\_\_\_ was not at the time of  
 "the delivery of the annexed writ, or at any time since, to be  
 "found in my bailiwick; therefore I could not have his body before  
 "the Justices within mentioned, as by the within writ I am com-  
 "manded. So answers," &c.

T. T. 1853.  
*Queen's Bench*

CROMMELIN v. THE MARQUIS OF DONEGALL.

May 31.

A, by indenture, covenanted with B that he would not without B's consent do or agree to any act whereby any part or parts of the appointment, uses or trusts of a deed of equal date should be invalidated or prevented taking effect, and that if D should die without executing the deed, A would do all acts necessary for corroborating the indenture; and on the event of the death of D, without executing said deed, if A should refuse for six months afterwards to do such lawful acts for such corroboration,

he, A, would, at the expiration of the six months, pay to B *the full value of the interest* intended to be vested in him by the deed of appointment, and all costs and damages caused by such neglect, and all sums expended on the faith of said deed of appointment. In an action brought for breach of this covenant, B giving no evidence of any actual damage sustained by him, but only evidence as to the value of the properties intended to be conveyed:—*Held*, he was entitled to damages equivalent to the benefit he might have lost, or to the loss he might have sustained by the non-performance of the covenant.

The words, "full value of the interest," are not to be viewed as a penalty for breaches of the covenant, being neither a specific sum of money, nor of the nature of money; they mean the full value of the interest in the beneficial produce of the properties to be embarked in the speculation.

In this case an action of covenant had been brought, on an indenture of the 23rd of July 1832, made between the plaintiff and the defendant. The defendant filed a demurrer to the declaration, and, on the argument of that demurrer, judgment was given for the plaintiff (a).

A writ of inquiry was thereupon sped, and the case was tried at the Summer Assizes of 1852, for the county of Antrim, before LEBROY, C. J. The evidence on behalf of the plaintiff consisted in showing the value of a certain fishery (being one of the hereditaments conveyed by an indenture of the 21st of July, and referred to in the deed of the 23rd of July) averaged £449. 4s. 7d. for six years: that certain limestone quarries (also therein referred to) were valued at £200 per annum; that the value of a lease from Lord O'Neill (therein included) was about £7500; that the value of another lease was worth 16 years' purchase of an annual rent of £276, and the value of the reversionary interest thereof was £1360; that the reversionary interest in certain other quarries was of the value of £1100, and of another lease was £500. The plaintiff gave no evidence of actual damage sustained by him.

The defendant went into evidence to show that the expenses of

(a) See 11 Ir. Law Rep. 423, where the pleadings and deeds relied on are fully stated; they are also referred to in the judgment of the Court; so that it becomes unnecessary to repeat them.

draining Lough Neagh (a portion of the premises conveyed) would be so great, that it would be utterly unprofitable as a reclaiming speculation; and his Counsel insisted there was no evidence laid before the jury to enable them to assess damages—no evidence of any work done or of any claim made, and that the speculation was a failure.

T. T. 1853.  
*Queen's Bench*  
CROMMELIN  
v.  
MARQUIS OF  
DONEGALL.

The plaintiff's Counsel argued that from the documents in evidence it appeared 30,000 acres might be reclaimed, and that the plaintiff having vested an interest with Lord Donegall for the purpose of making these reclamations, and Lord Donegall having refused to sign the deed of appointment, the plaintiff had suffered by his default, and was entitled to a moiety of the interest in the property vested in certain trustees, because of Lord Donegall having obtained a private Act of Parliament disqualifying him from doing what he had contracted to do.

The CHIEF JUSTICE left it to the jury to estimate the damages between the two parties; stating, in reference to the two leases, that the speculation having failed, and the conveyance being made, the trustees could not hold it against the true owner—that it was virtually a trust for the plaintiff; and therefore, with respect to them, the plaintiff was not entitled to damages. As to the limestone quarries, his Lordship held, on the construction of the deed, they were not to be included as matter of profit, but were to be used in the execution of the proposed improvement, and that the plaintiff was not entitled to damages under that head. As to two of the properties in the trust, one of them valued at £7000, the other at £4000 odd—as to them, Lord Belfast (the present defendant), entered into an agreement to obtain his father's signature to the deed, or else to procure a private Act of Parliament; and in the event of failure of either of the undertakings, he was to pay the plaintiff the full value of the interest. The breach of this covenant, the CHIEF JUSTICE held, was to be regarded as presenting a case for penal damages, rather than a case of liquidated damages; he left it to the jury to say whether they regarded it in the nature of a penalty, and then to say what damages the plaintiff had sustained in consequence of Lord Belfast not having obtained the conveyance.

T. T. 1853. As plaintiff had given no evidence of actual loss, it was for the *Queen's Bench* jury to say, on the whole, what damages the plaintiff had sustained. CROMMELIN v. MARQUIS OF DONEGALL. The jury found for the plaintiff £1000 damages; but to avoid expense, his Lordship desired them to find what was the full value of the properties of the defendant, intended to be vested in the trustees, by the deed of July 1832, for the trust purposes; and they found the value to be £11,000.

It was agreed that the verdict for £1000 should be reduced to 6d., or raised to £11,000, in the event of the Court being of opinion that such increase or reduction should be made, otherwise to stand for £1000; and in pursuance of this agreement, the defendant, on a previous day, obtained a rule *nisi* to reduce the verdict to 6d., and the plaintiff obtained one to increase the damages to £11,000. Both rules were now discussed—*Napier, O'Hagan, Ross Moore and Meade* appearing for the plaintiff; *The Attorney-General* (Brewster), *Molyneux* and *May*, for the defendant.

*Cur. ad. vult.*

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CRAMPTON, J.

May 31. This case came before us on two motions; one by the defendant, to reduce the verdict to nominal damages, and the other by the plaintiff, to increase them from £1000, the amount of the verdict, to £11,000.

The action was an action of covenant, founded on an indenture between the plaintiff and the defendant, dated the 23rd of July 1832. The defendant demurred to the plaintiff's declaration, and there was judgment in this Court for the plaintiff.

Upon that judgment a writ of inquiry was sped before the CHIEF JUSTICE. At the trial, the defendant insisted that his Lordship should direct the jury to find only nominal damages. The plaintiff, on the other hand, insisted that the damages to which he was entitled were liquidated damages, fixed by the deed itself to be the full value of the properties intended to be conveyed, and that his Lordship should direct the jury to estimate that value, and to find their verdict accordingly.

The CHIEF JUSTICE adopted neither the view suggested by the

plaintiff, nor that suggested by the defendant; but he desired the jury to estimate the damages actually sustained by the plaintiff, by the breaches of covenant complained of, and so to measure their verdict. The jury brought in a verdict for £1000. His Lordship, however, to save expense, desired the jury to find what was the full value of the defendant's properties, intended to be vested in the trustees for that purpose, and the jury found the value to be £11,000. It was then agreed by the parties that the verdict as found for £1000 should be reduced to 6d. or raised to £11,000, in the event of the Court being of opinion that such reduction or increase should be made; otherwise the verdict to stand for £1000; and accordingly, the defendant now moves to reduce the verdict to 6d., and the plaintiff to increase it to £11,000, according to the reservation made at the trial.

T. T. 1853.  
*Queen's Bench*  
 CROMMELIN  
 v.  
 MARQUIS OF  
 DONEGALL.

We have heard the case argued; my Lord Chief Justice was present at the argument, and has authorised me to say, that he fully concurs in the conclusion at which the Court has arrived, and which conclusion is not to change the verdict, but to let it stand as found by the jury.

It becomes now necessary to state the particulars of the covenant, for the breach of which, it is admitted, the plaintiff is entitled to some damages. The deed of the 23rd of July 1832 was made by and between the plaintiff, of the one part, and the defendant, then Earl of Belfast, of the other part, his father, the late Marquis of Donegall, being then living. This deed recites an indenture of the 21st of July 1832, made between the late Marquis of Donegall, of the one part, and the defendant, the Earl of Belfast, of the other part, whereby certain lands, tenements, fisheries and rights of fishery (subject to any existing lease), and the reversion and inheritance thereof, and all quarries, &c., were (subject to the life estate of the then Marquis of Donegall) limited to such uses as the defendant should appoint, with remainder over, in default of appointment. And the said indenture of the 23rd of July further recited, that by an indenture then prepared and engrossed, and intended to bear equal date therewith, and made between the defendant, of the first part, the plaintiff, of the second part, and



T. T. 1853. *Queen's Bench.* Hugh Kennedy and J. Echlin, of the third part, the defendant, in execution of the powers vested in him, directed that the reversion and inheritance, expectant upon the expiration of the existing leases in the said lands, fisheries, &c., should, subject as therein, go<sup>d</sup> and remain to the said H. Kennedy and J. Echlin, their heirs and assigns, for ever, upon trust, as therein mentioned, for the purpose of enabling the plaintiff during his life, and the defendant after his death, to make several improvements therein mentioned; and certain leasehold interests, part of the Donegall estates, then vested in the plaintiff, were by the plaintiff conveyed to the said trustees, upon the trusts and for the purposes aforesaid. The deed of the 23rd of July further recited, that the deed of the 21st of July had not been yet executed by the then Marquis of Donegall, and that it was possible some time might elapse before its execution by him; and that it was probable that, before he did so, the plaintiff would incur expense in respect of the trusts in the second recited deed contained; and in consideration thereof, the defendant had agreed to enter into the covenants, for the breaches whereof this action was brought. The covenants are these:—That the defendant would not do or consent to any act, whereby any or either, or any part or parts of the appointment, uses or trusts, in the deed, of equal date, should be in any way invalidated, or prevented from taking effect; and further, that if the then Marquis of Donegall should die without executing the deed of the 21st of July 1832, that the defendant, on request, would do all such lawful and reasonable acts, whether by obtaining an Act of Parliament or otherwise, as should be advised by Counsel to be necessary or expedient for corroborating the indenture of equal date; and further, that in the same event, viz., the death of the late Lord Donegall, without having executed the deed of the 21st of July 1832, if the defendant should refuse or neglect, for six months after that event, and after request as aforesaid, to do such lawful acts as Counsel should advise to be necessary for corroborating, as far as defendant lawfully might, the deed of appointment, that he would, at the expiration of the six months, pay to the plaintiff the full value of the interest intended to be vested in, or given to, him

by the deed of appointment and trust; and all *costs and damages caused by such neglect, and all sums expended on the faith of said deed of appointment.* T. T. 1853.  
*Queen's Bench*  
 CROMMELIN  
 v.  
 MARQUIS OF  
 DONEGALL.

It is for the breach of these covenants that the action in this case was brought. The plaintiff gave no evidence of any actual damage sustained by him, nor of any expense which he had incurred on the faith of this agreement.

The first question is, whether this is a case in which the Judge should have directed the jury to find nominal damages only? The defendant's motion is to reduce the verdict to sixpence. We think that motion to be quite untenable. The plaintiff has, by the defendant's default, lost the benefit of a contract which might have proved beneficial to him. If A covenant with B to do an act by which B may be benefited, or by which he may be saved from injury, B is clearly entitled to damages, equivalent to the benefit which he may lose in the one case, or to the loss which he may sustain in the other, by the non-performance of B's covenant; and that, although he does not make proof of any special damage which he has sustained thereby. The case of *Litthbridge v. Wigton* (a) illustrates this position. It must be for the jury to measure the damages, and we must therefore refuse the defendant's motion.

There is more difficulty in disposing of the plaintiff's motion; and we have had much doubt and deliberation before we have been able to come to a conclusion respecting it.

It is important to understand here what the parties to this deed meant by the terms, "the full value of the *interest* intended to be vested in or given to the plaintiff by the deed of appointment." That value may be taken as a proper measure of the plaintiff's damages. The plaintiff contends that it means the full value of the properties intended to be vested or given by the deed of appointment. The defendant, on the other hand, insists that such value is in the nature of a penalty, to secure the plaintiff in such damages as he has actually sustained.

I do not think that either of these is the correct view of this covenant. I think it difficult to view *this value of the interest* as a penalty to cover breaches of the covenant. My own opinion

(a) 2 B. & Ad. 772.

T. T. 1853.  
*Queen's Bench*  
 CROMMELIN  
 v.  
 MARQUIS OF  
 DONEGALL.

is, that it is not a penalty, either in form or in effect. It is neither a specific sum of money, nor is it a thing of the nature of money, or immediately convertible into money; and the covenant is a covenant not only to pay the value of the interest, whatever that may mean, but in addition, to pay the damages and costs sustained by the plaintiff, by reason of the defendant's refusal or neglect, and also all sums expended by the plaintiff on the faith of the agreement. How can that be a penalty to secure damages, costs and expenses, when the covenant is to pay the damages, costs and expenses, over, above and beside this, which the defendant calls a penalty? On the other hand, it is indeed difficult to imagine that the parties intended that for any and every breach of this covenant, the plaintiff should not only be paid his damages and costs, sustained by reason of the defendant's neglect, and the expenses that he had incurred, but also the full value of the properties intended to be conveyed to the trustees.

The transaction was a partnership speculation between the parties; the partnership did not take effect, the speculation failed, and plaintiff lost the benefit of the speculation by the default of the defendant; and it is but justice that he should be indemnified for that loss by the defendant. The best construction I can put upon this covenant is, that the full value of the interest means not the full value of the properties conveyed to the trustees, but the full value of the interest in the beneficial produce of the properties to be embarked in the speculation. The words favour this construction; we find in the covenant the word "interest," in the singular number, not "interests," in the plural. Again, it is interest vested in or given to the plaintiff, not the hereditaments and premises which were to be vested in the trustees.

Suppose the late Marquis of Donegall had died shortly after the execution of this deed, the covenant would have been broken, without the defendant's fault; suppose the defendant had died shortly after the execution of this deed, can it be contended that his heirs or executors could be liable for the full value of the property intended to be conveyed to the trustees by Lord Donegall? This construction would be an untenable one: 3 *Car. & Pay.*, p. 241. It follows then, that both motions are refused, and the verdict

is to stand; we give no costs, the defendant undertaking that the leases conveyed by plaintiff to the trustees shall be immediately reconveyed. The whole undertaking has proved abortive, and the parties should be placed as far as possible in *statu quo*.

Rule accordingly.

T. T. 1853.  
*Queen's Bench*  
CROMMELIN  
v.  
MARQUIS OF  
DONEGALL.

THE QUEEN, at the prosecution of GILES and another,

v.

AUSTIN and others.\*

June 6.

IN this case, an order *nisi* had been obtained, for a criminal information, in the nature of a *quo warranto*, calling on the defendants to show cause by what right they claimed to exercise the office of Poor-law guardians for the union of Youghal.

It appeared from the affidavits in support of the motion, that prior to the last election of Poor-law guardians for that union, one John Greene—in whose hands a number of proxies had been deposited—lodged the same with the Returning-officer for the purpose of examination, and that voting papers were issued by the Returning-officer in respect of each of those proxies, and were sent by him to Greene. They were indorsed by the Returning-officer, "John Greene, proxy for ——— (rate-payer.)" Greene, having completed the voting papers, by initialling the names of the candidates, but without adding any further statement as to the character in which he acted, returned them to the Returning-officer to be recorded. The Returning-officer, being of opinion that the election order of the Poor-law Commissioners (1852), article 24, had not been complied with, in consequence of Greene not having himself stated on the voting paper the name of the person for whom he was proxy, rejected the votes in question; and accordingly, to raise the question of the propriety of this rejection, this proceeding was adopted.

Where a voting paper for the election of a Poor-law guardian was signed by a proxy, duly authorised, but which paper did not contain on the face of it the name of the person authorising the proxy to vote: Held, that votes given by such voting paper were properly rejected, the paper not being in conformity with the election orders of the Poor-law Commissioners.

Held also, the 6 & 7 Vic. c. 92, s. 23, having provided a special tribunal for the decision of such questions, this Court would not grant a *quo warranto*.

\* LEFROY, C. J., *absente*.

T. T. 1853. *Hayes* (with him *Exham*) moved to make absolute this conditional order.

THE QUEEN  
v.  
AUSTIN.

It will be contended on the other side, that the proper proceeding to raise this question has not been adopted, and that a *quo warranto* is not the remedy; and the case of *The Aston Union* (a) will be relied on, where it was held that an information in the nature of a *quo warranto* did not lie for exercising the office of the guardian of the poor for a union; but that case must be considered as overruled by the case of *Darley v. Kinahan* (b), where the Judges were unanimously of opinion that a proceeding by information, in the nature of a *quo warranto*, would lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature. In *Regina v. St. Martin's in the Fields* (c), it was held that a *quo warranto* will lie for the office of clerk to a board of guardians; and Lord Campbell there says:—"If this case had arisen before *Darley v. The Queen*, I should have been very much perplexed, "because the modern authorities were conflicting, but that case "lays down a rule which we are bound to follow; and that "rule is, that if an office be created by Act of Parliament, and "be of a public nature, an information in the nature of a *quo warranto* will lie for the usurpation of it, although the usurpation "of it does not involve an usurpation of the rights of the Crown."

That being so, it is clear upon the affidavits, that the Court ought to make absolute this conditional order. The 83rd section of 1 & 2 Vic., c. 56, enacts, that in all elections of guardians, the votes shall be given or taken in writing, and collected and returned in such manner as the Commissioners shall direct; and the 88th section enables the Commissioners to appoint a Returning-officer at such election, with such assistants as they may deem necessary, and prescribe the duties which he shall perform at such election; and the 84th section authorises a rate-payer, by writing under his hand, to appoint any person to vote as his proxy; and if the proxy claim to vote, he is within one week to deliver the original or an attested copy of the writing appointing such proxy, to the guar-

(a) 6 A. & E. 784; S. C. nom. *Rez v. Carpenter*, 1 N. & P. 773.

(b) 12 Cl. & F. 520.

(c) 15 Jur. 800.

dians, or some person acting as Returning-officer. In pursuance of the powers vested in them by the Act, the Commissioners, by article 24 (1852), provided, that the voter, whether he be proxy of a rate-payer or not, should place his own initials opposite the name of every candidate for whom he voted, and should sign the voting paper; and every proxy should also state thereon the name of the person for whom he is proxy; but if the voter could not write, he might procure a person to write the voter's name on the paper in full, and such person should then write the voter's initials opposite to the name of every candidate for whom the voter intended to vote, and forthwith affix his own signature to the paper as witness to the mark of the voter, which was to be affixed by the voter to the paper in place of his signature. All the requisites directed by the statute were duly complied with, and the only question arises upon this 24th article. The indorsement on the voting paper complied substantially with the terms of this article; it was not necessary for Greene to put the name of the person for whom he was proxy in his own handwriting. He virtually did so, for he signed the voting paper in his own name; and the statement of the character in which he signed it, appears by the indorsement. The object of the regulation was merely to insure identification.

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 AUSTIN.

*Macdonogh*, contra.

*Quo warranto* does not lie in such a case as the present; and if it did lie, the notice of motion is insufficient, in not stating the grounds upon which it was sought for. This being a transitory office, subsisting but for one year, a *certiorari* would have been the proper remedy, and it could have been decided on the return thereto: *Rex v. Ramsden* (a). But the 6 & 7 Vic., c. 92, s. 23, provides a special tribunal for deciding questions of this nature; it enacts, "That in case any question arise as to the right of any person to act as an elected guardian, it shall be lawful for the said Commissioners, if they see fit, to inquire into the circumstances of the case, and to issue such order or orders therein, under their hands and seal, as they may deem requisite for deter-

(a) 5 N. & M. 325; S. C. 3 Ad. & E. 456.

T. T. 1853. "mining the question; and no such order shall be liable to be  
*Queen's Bench* removed by writ of *certiorari* into the Court of Queen's Bench,  
 THE QUEEN "unless the application for such writ be made during the Term  
 v.  
 AUSTIN. "next after the issuing of such order."—[*Hayes*. That course is  
 only optional with the Commissioners: we called on them to act,  
 and they made no reply to our application.—CRAMPTON, J. May  
 we not suppose from that, the intention of the Legislature was, that  
 the party should proceed by *certiorari*?—MOORE, J. It appears  
 to me that this 23rd section was passed to constitute the Commis-  
 sioners the tribunal to which the appeal should be made, and  
 that they would inquire into it; and there is a form given for  
 removing the proceeding into this Court by *certiorari*. If the  
 Commissioners did entertain the matter, they should show, upon the  
 face of the return, upon what grounds they had acted, and this  
 would enable this Court to say whether they were right or not.]—  
*Macdonogh*. With regard to the case of *Regina v. St. Martin's*,  
 the office was *quamdiu bene se gesserit: Rex v. Dowling (a)*.  
 It would cause very great inconvenience to hold this indorsement  
 part of the document, and might open a door for fraud.

*Exham* replied.

CRAMPTON, J.

Without entering into the question, whether a *quo warranto*  
 would lie to try the right to such an office as the one in question—  
 another important question arises—namely, how far the Court, in  
 the exercise of its undoubted discretion, should go in granting the  
 order sought for?

It appears to me that, upon two grounds, we could not grant a  
*quo warranto*: first, the Act of Parliament has not been complied  
 with, and I should say the votes were properly rejected. The  
 Poor-law Act allows voting by proxy, but requires that the  
 proxy should be nominated in writing, and gives very particular  
 directions as to the mode in which the votes are to be taken. These  
 directions are contained in the rules for the guidance of the guar-  
 dians, published under the direction of the Poor Law Commissioners.

(a) 4 T. R.

The 18th rule accordingly imposes certain duties on the Returning-officer. The proxy must be previously lodged for examination in the hands of the Returning-officer. After the claim is made, the Returning-officer is to give every voter a voting paper, with specific directions thereon. It is his duty to distribute these papers. If the Returning-officer had done nothing more than what was required of him by the Act of Parliament, no question could have arisen; for if there had been no indorsement on the back of the voting paper, he would have been bound to reject the votes. Now, the 24th article requires that the voter, whether he be a proxy or not, shall place his own initials opposite to the name of every candidate for whom he votes, and shall sign the voting paper; and the proxy is to state thereon the name of the person for whom he is proxy. Here there is no statement by the proxy, on the face of the voting paper, of the person in whose name he was voting. But it is said there is an indorsement on the back, which must be taken as containing the statement required. This indorsement was not flatted by Greene, and we cannot assume that he adopted it; and it is sought to confound that which was intended merely as a direction to the distributor, with the statement required to be put on the paper by the proxy. The Commissioners have gone beyond their own regulations by the directions, for they do not require that he is merely to state the name of the person whom the proxy represents, but they add something more—namely, that this statement is to be under the proxy's handwriting. Here there was no such statement by the proxy, nor even an adoption of it.

But then, it is said that this statement is unnecessary, because in article 26, three instances are mentioned in which the vote shall be rejected, as if it were to be confined to those three instances only. It is true, three instances only are mentioned, and it says they are to be strictly complied with; but it is going too far to say, because those three instances only are mentioned, no other case can exist in which it is competent for the Returning-officer to reject the votes; for he is bound to inquire into the validity of the votes, and to make a return, to the best of his ability and judgment.

T. T. 1853.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 AUSTIN.



T. T. 1853. I therefore am of opinion that there is no question either of law or *Queen's Bench* fact to be tried.

THE QUEEN  
v.

AUSTIN.

Further, the provisions of the 23rd section of 6 & 7 Vic., c. 92, appear to me very important. That section was introduced for the purpose of guiding this Court, in respect to interference with these elections, and by implication taking away the right of granting a writ of *certiorari*. The party considering himself aggrieved might have applied to the Commissioners, and any order they might make could be removed into this Court by *certiorari*. Now, it is the rule of this Court, that, in the exercise of its discretion, it will not interfere by granting a *quo warranto*, where there is existing a proper tribunal by which the question can be decided, and therefore the motion must be refused.

PERRIN, J., and MOORE, J., concurred.

Motion refused, with costs.

#### HICKEY v. MUSGRAVE.

June 10.

Judgment may be entered in the name of one executor against the other, on a warrant authorising a judgment against both.

LEAHY moved for liberty to enter judgment on a bond. The warrant authorised the conuses or her executors to enter judgment. The conusee died, having appointed the plaintiff and defendant her executors. The plaintiff alone proved the will, but the defendant did not renounce.

*Per Curiam.*

Take a conditional order, serving the defendant.

M. T. 1853.

Exchequer.

GEO. RUTLEDGE, JAMES PETER RUTLEDGE and others,

v.

JOHN HOOD and others.

(Exchequer.)

Nov. 23, 24.

THIS was an action of ejectment on the title, brought by the plaintiff George Rutledge, professedly for the purpose of disputing the title of the defendant Hood to the lands of Togher, in the barony of Kilmaine and the county of Mayo, claiming them as a purchaser under a conveyance executed by the Commissioners for the Sale of Incumbered Estates in Ireland. The case was tried before Mr. Justice Perrin at the Summer Assizes of 1852, at Castlebar. The title of the plaintiff George Rutledge was (as appeared from the Judge's report) deduced from Peter Rutledge, who was seised in fee-simple of the lands in question in the year 1766; and there was no denial that the plaintiff George Rutledge had been lawfully entitled to a large estate, of which the lands in the ejectment were part; and being seised in fee thereof, in March 1834, became party to a deed of settlement, by which those lands were limited, in strict settlement, on himself for life, remainder to his first and other sons

Ejectment on the title.—A, being seised of lands in fee-simple, executed a deed of settlement, by which he became tenant for life, with power to charge four years' income on the property, remainder to his first and other sons in tail male. He afterwards executed two mortgages—one to B, and another to C. The latter filed a bill in the Court of Chancery for a foreclosure and sale, and

impeached the deed of settlement as voluntary. The deed was declared voluntary as against the creditors of A. C became insolvent, and his assignee filed a petition in the Incumbered Estates Court for a sale of a portion of the lands in fee-simple. Pending the proceedings in the Incumbered Estates Court, a petition for re-hearing of the former decree was presented on behalf of the first tenant in tail. Several applications were made to the Commissioners to postpone the sale until after the re-hearing, but they declined to do so; and, pending those proceedings, sold a portion of the estate to the defendant in fee-simple. Previous to the execution of the mortgage to C, A had confessed judgments, which, together with the mortgage to B, amounted to a sum greater than four times the annual value of the property; but it did not appear in evidence what was due on those judgments. The Court of Chancery, after the sale, reversed the former decree, so far as it declared the deed of settlement voluntary. *Held*, that on this state of facts, the Commissioners of the Incumbered Estates Court had jurisdiction to ascertain and adjudicate as to incumbrances; and that, having done so in the present case, their decision was conclusive, as to there being an incumbrance sufficient to give them jurisdiction to sell, and the defendant's title, under their conveyance, indefeasible.

*Quere*.—Whether a conveyance from the Commissioners is conclusive as to their jurisdiction, and the accuracy of all their proceedings?

M. T. 1853.  
Exchequer.  
 RUTLEDGE  
 v.  
 HOOD.

in tail male, reserving to himself a power to charge the inheritance with a sum equal to four years' amount of the annual income of the estate. James Peter Rutledge, his eldest son, was the first remainderman in tail. In the month of May 1837, the plaintiff George Rutledge mortgaged his Mayo estate to Oliver Jackson for £4000, with which sum he thereby, in part execution of the power, charged his Mayo estate. In the year 1842, the plaintiff George Rutledge executed a further mortgage to Joseph Kelly, his solicitor, for £300, for cash advanced, and leaving a blank for costs, which was to be filled up when they were taxed and ascertained, but not to exceed £1000. In 1843, Joseph Kelly filed a bill in the Court of Chancery, for the purpose of enforcing payment of his mortgage debt by foreclosure and sale; and in that suit he impeached the settlement of 1834 as voluntary and post-nuptial, and brought before the Court the persons claiming under it. In May 1844, a decree was pronounced by the Lord Chancellor, declaring that the settlement of the 8th of March 1834 was voluntary and void as against the plaintiff in that suit, and the creditors of the said George Rutledge having incumbrances affecting his estate.

Joseph Kelly having become insolvent, he executed a deed, vesting his rights under the said mortgage in Patrick O'Brien, as a trustee for his creditors; and Patrick O'Brien, on the 19th of November 1849, filed a petition in the Incumbered Estates Court, praying that the mortgaged premises, or a competent part thereof, might be sold; and on the 18th of December 1849, an absolute order for sale was made. On the 6th of June 1851, a petition was presented in the Court of Chancery, by John Kelly, the guardian of James Peter Rutledge, the eldest son of the plaintiff George Rutledge, and then a minor, setting forth that the decree of the 24th of May 1844 was defective and erroneous, and that the deed of the 8th of March 1834 should not have been declared voluntary and void, and submitted that the cause might be re-heard, and the decree reversed or varied; and accordingly said cause was re-heard on the 17th of February 1852, and it was decreed that the bill should be dismissed, so far as the same declared the deed of 1834 voluntary and void as against the plaintiff in that suit, and

the other creditors of George Rutledge, the plaintiff in this suit. Pending the re-hearing of that cause, various applications were made to the Incumbered Estates Court to postpone the sale until the re-hearing of the cause in the Court of Chancery, which were refused by the Commissioners, and the defendant John Hood became the purchaser of these lands in fee-simple. It appeared that previous to the execution of the indenture of mortgage of 1842 (being the mortgage to Joseph Kelly), the plaintiff George Rutledge was indebted by judgments to several persons—the aggregate amount of which, together with the mortgage to Oliver Jackson, exceeded in amount four times the annual income of the estate (the sum he was entitled to charge on the estates, under the power reserved by the settlement of 1843); but there was no evidence that any thing was due, or that any proceeding had been taken on foot of the judgments.

M. T. 1853.  
*Exchequer.*  
**RUTLEDGE**  
*v.*  
**HOOD.**

On behalf of the defendant, the conveyance from the Commissioners of the Incumbered Estates Court, in pursuance of the 12 and 13 *Vic.*, c. 77, was alone given in evidence at the trial, and relied on, as conferring an absolute indefeasible estate upon the defendant.

On behalf of the plaintiff, it was urged that by the deed of mortgage to Oliver Jackson, and the several judgments confessed by the plaintiff George Rutledge, before the execution of the deed to Joseph Kelly in 1842, the power of charging contained in the settlement of 1834 being exhausted, the petitioner Patrick O'Brien was only an incumbrancer on the life estate of George Rutledge, which the Commissioners, under the provisions of the Act of the 12 & 13 *Vic.*, c. 77, were not empowered to sell; also that the judgments were charges under 3 & 4 *Vic.*, c. 105, s. 22, prior to Kelly's deed. The learned Judge told the jury that they were not at liberty to consider whether there had been an exhaustion of the power, nor whether the charges of George Rutledge exceeded four years' value of the estate—that the order of the Commissioners was final—their conveyance and adjudications were conclusive; and that, in his opinion, the jury were bound by the law to find a verdict for the defendant; and added that, although he directed the jury to find for the defendant, still he should be glad to have his opinion reviewed and considered by the Court above. The learned Judge also stated in his report,

M. T. 1853. that he did not reserve any questions for the Court, nor reserve  
Eschequer. leave to move the Court to enter a verdict for the plaintiff. A  
 BUTLEDGE verdict having been found for the defendant, a conditional order  
 v. was obtained by the plaintiff, "that the verdict had at the last  
 HOOD. "Assizes of the county of Mayo be set aside, and a verdict for  
 "the plaintiff entered instead thereof, pursuant to the leave re-  
 "served by the learned Judge at the trial, unless cause," &c.

*Walker*, for the defendant, now showed cause.

The learned Judge who tried the case has certified that he did not reserve any questions for the Court, nor reserve leave to move the Court to enter a verdict for the plaintiff; the conditional order, therefore, cannot be supported.—[PENNEFATHER, B. We shall hear the case as a motion to set aside a verdict.]—It is admitted that the total amount of the judgments and the mortgages exceeded the sum which the tenant for life was empowered to charge; but it did not appear in evidence that there was any thing due on foot of those judgments, or that any proceedings had been taken on foot of them. It was contended on the other side, that the petitioner in the Incumbered Estates Court must have an incumbrance affecting the estate at the time he presents his petition, in order to give the Court jurisdiction to entertain it; and it was contended that O'Brien, the petitioner, was not such an incumbrancer, because of the alleged exhaustion of the power. The decree of the Court of Chancery, of 1844, has declared this to be a good charge, and that decree might be relied on as a complete answer to the argument founded upon the exhaustion of the power; but, independently of the decree, it is contended that the Commissioners had full jurisdiction to entertain this matter, and that their decision upon it cannot be questioned. The 15th section of the 12 & 13 Vic., c. 77, confers upon the Commissioners all the powers, authority and jurisdiction of a Court of Equity in Ireland, for the investigation of title, and for ascertaining and allowing incumbrances and charges, and the amounts due thereon. The policy of the Act was, that sales of land might be effected as speedily as possible, and the purchase-money subsequently disposed of amongst the creditors, when their rights and priorities should have been ascertained.

The 17th section enables any incumbrancer on land to apply to the Commissioners for a sale of such land, under the provisions of the Act, for the purpose of discharging the incumbrances thereon; and by the 54th section, being the glossary to the Act, the word "incumbrance" is defined as "any legal or equitable mortgage in fee, or for any less estate, and also any money secured by the trust or by judgment, decree or order of any Superior Court of Law or Equity, duly registered, and also any legacy, portion, lien or other charge, whereby a gross sum of money is secured, to be paid on an event or at a time certain, and also any annual or periodical charge," &c.; and the word "incumbrancer" is defined as "any person entitled to such incumbrance, or entitled to require the payment or discharge thereof." The Commissioners have power to decide what is or what is not an incumbrance; otherwise it might be inferred that unless a person were certain that the fund to be realised would reach his demand, and that, in fact, it should do so, he would not be entitled to maintain a petition. By the 19th section, the meaning of the word "incumbrance" is qualified, to some extent, "that for the purpose of authorising a sale under this Act, the land shall not be deemed subject to an incumbrance where the same shall not affect the inheritance," &c. The 21st section enables the Commissioners to give notice to such persons as they shall think fit, in connection with the proceedings towards a sale of land, and if they think it expedient, to make an order for the sale of all or any part of such land. The 23rd General Order of the Commissioners shows the course taken to give publicity to their proceedings—it requires, when an absolute order for a sale has been pronounced, "that advertisements shall be published in a Dublin newspaper, and in one or more local newspapers, and such other newspapers as the Commissioners shall direct," giving notice of such order, and calling upon all claimants of estates, interests or incumbrances in or upon the premises ordered to be sold, to come forward and establish their several claims and demands. The 24th section directs that lands which have been directed to be sold shall be sold under the control of the Commissioners, by public sale or private contract, and generally in such man-

M. T. 1853.

Exchequer.

RUTLEDGE.

v.

HOOD.

M. T. 1853.

Exchequer.

BUTLEDGE

v.

HOOD.

ner as they shall think fit; and that the conveyance of the land shall be made by the Commissioners under their seal, and signed by two of them, and the execution by any other person shall be unnecessary, and such conveyance "shall express or refer to the tenancies, leases and under-leases (if any), and charge (if any), subject to which "the sale is made:" thus requiring the Commissioners to decide as to the existence of those charges, in the manner pointed out in the preceding section. The 27th section enacts "That every such conveyance, executed as aforesaid by the Commissioners, upon the "sale of land, shall be effectual to pass the fee-simple inheritance "of the land thereby expressed to be conveyed, subject to such "tenancies, leases and under-leases as shall be expressed or referred "to therein, as aforesaid; but save as aforesaid, and as hereinafter "provided, discharged from all former and other estates, rights, titles, "charges and incumbrances whatsoever of her Majesty, her heirs "and successors, and of all other persons whomsoever." The 49th and 51st sections render the proceedings of the Commissioners more stringent still than the previous sections. The former section enacted that every conveyance, executed as required by the Act should, "for all purposes, be conclusive evidence that "every application, proceeding, consent and act whatsoever, "which ought to have been made, given and done previously "to the execution of such conveyance or assignment has been "made, given and done by the persons authorised to make, give and "do the same; and no such conveyance shall be impeached by "reason of any informality therein." The 51st section enacts that "every order of the Commissioners shall be final." It is provided, however, that the Commissioners may allow an appeal from their orders to the Privy Council, and then the orders of the Privy Council shall be final. It has been alleged that there might be great hardship inflicted on the owners of property by conveyances made under such powers; but hardships will not afford an argument as to the construction of an Act of Parliament; and similar hardships may possibly arise under the statutes relative to drainage, and other public works, which contain provisions equally stringent. No irregularity appeared, or was even alleged, in the proceedings after

the petition was presented. The only objection raised to those proceedings was, that the petitioner had no incumbrance affecting the lands vested at the time he presented his petition; but the petitioner is estopped from making this objection, by the decree of the Court of Chancery in a suit to which he was a party. Counsel also referred to the 3 & 4 Vic., c. 105, s. 22, as to judgments affecting lands over which the judgment debtor had a disposing power.—[PIGOT, C. B. Judgments are a charge, to the extent that consor has a disposing power over the lands.—GREENE, B., referred to *Walker v. Bentley (a)*, in relation to the force of the word “such,” that occurs in the statute.]

M. T. 1853.  
*Exchequer.*  
RUTLEDGE  
v.  
HOOD.

*West*, with *W. Bourke* and *Jordan*, contra.

The Commissioners of the Incumbered Estates Court must comply strictly with the provisions of the Act, in order to acquire jurisdiction. Their powers depend entirely upon their conforming to the exigencies of the statute. There must be an incumbrance and incumbered estate, a petitioner and owner, to give jurisdiction; and if the Court does not comply with the provisions of the Act, in reference to each of these, the title they give to a purchaser is bad, unless the conveyance concludes all questions. It is imperative on the Court, then, to decide this question, whether the lands of A can be sold for the debt of B? In 1 *Sug. Ven. & Pur.*, ed. of 1846, p. 68, there is stated the manuscript case of *Vans Agnew v. Stewart (b)*, where the Court of Session was authorised by Act of Parliament to ascertain the amount of the debts of a deceased tenant in tail, chargeable on the entailed estate, and having ascertained them, to sell the estate. Lord Eldon, after commenting upon the difficulties in which purchasers were placed by the mistakes of Courts having such jurisdiction, stated, that “He conceived that every “Court was bound to proceed according to the directions of the “Act; and if the Court of Chancery was bound to proceed according to the prescribed mode, and failed to do so, that the “transactions of that Court would be no more a security to the “purchaser than if that Court had not been authorised by law to

(a) 9 Hare, 629.

VOL 3.

(b) House of Lords Cases, 1822, M.S.

58 L



M. T. 1853.  
Exchequer.  
 RUTLEDGE  
 v.  
 HOOD.

"proceed at all." In this case, the requirements of the Act have not been observed; the Court was therefore acting without jurisdiction, and could not confer any title on a purchaser. The title of the Act contemplates an incumbrance. Section 16 enacts that the land must be subject to an incumbrance, to enable an incumbrancer, under the 17th section, to apply for a sale. The 19th section enacts that, to authorise the sale of lands, there must be either an incumbrance affecting the inheritance, or a term of fifty years unexpired. The incumbrance in this case was insufficient under that section. By the 22nd section, it is provided that the Commissioners shall not make an order for sale of lands, if it be shown by the owner that no part of such land is subject to a receiver, or in possession of an incumbrancer, and that the annual interest on charges does not amount to half the net annual income; and concludes with the proviso, "that the decision of the said Commissioners thereupon shall, in all cases, be final and conclusive, to all intents and purposes whatsoever." The final nature of the Commissioners' decision only refers to the question of the proportionate amount of the net rent, and the interest on charges, which is a fluctuating quantity. That proviso would be useless if the deed of conveyance were conclusive as to every question. The words of the 27th section, as to the effect of the assurance, are admittedly very strong; but they contain a condition annexed to the conveyance, that must be fulfilled before it shall be operative, namely, that it shall be "executed as aforesaid." The force of these words is the same as of the words, "every deed properly executed."—[GREENE, B. Those words may have reference to the execution of the conveyance by two of the Commissioners, without the execution for any other party being necessary.]—In the 49th section there is a similar condition; and it is therein enacted that "no such conveyance, assignment or order shall be impeached by reason of any informality therein." The defect here, it is contended, is substantial, and not formal, *expressio unius est exclusio alterius*. The conveyance is evidence that every thing was done regularly; but we impeach the truth of the petition contending that the incumbrance for which the estate was sold was no legal

charge upon it; the power to charge having been exhausted prior to the creation of that charge. With respect to the decree in Chancery declaring the settlement voluntary; the sale was not made until after the petition for re-hearing had been presented.—[PIGOT, C. B. But it was in force at the time of the sale. The 15th section appears to me very material to this question, in giving to the Commissioners all the powers, authority and jurisdiction of a Court of Equity in Ireland, "for *ascertaining* and allowing incumbrances and charges, and the amounts due thereon," &c. Does not that authority give the Commissioners the power of deciding whether or not they have jurisdiction, so far as it depends on the incumbrance?—PENNEFATHER, B. Suppose both decrees of the Court of Chancery were out of the case, and the Commissioners had themselves decided that there was an incumbered estate: now, I think it must be confessed, that the power of deciding as to mortgages and judgments being incumbrances was within their jurisdiction. From the form of the proceedings in that Court, it was not possible for the Commissioners to decide before sale the peculiar nature of the incumbrances, and it might eventually prove that the petitioner had no charge at all, other charges to a certain amount having been previously laid upon the estate. The decree reversing the previous decree cannot, I think, disturb a purchaser.—GREENE, B. Where all the proper parties are before the Court, the sale is good, no matter what may be done afterwards; that is decided in *Bennett v. Hamilton (a)*, and *Bowen v. Evans (b)*.—Nothing but express legislation can take away the jurisdiction of the Superior Courts to examine the proceedings of the Incumbered Estates Court, or question the right on which its jurisdiction is founded.—[GREENE, B. The 51st section makes the orders of the Court final, unless appealed from.]-That is, if the order is made in a matter within their jurisdiction. Suppose a man has two sons, A and B; that the estate descends to A, who, having taken possession, leaves the country for seven years, by which a presumption of his death arises, and B, having entered into possession, mortgages the estate, and that the mortgagee sold the estate in the Incumbered

M. T. 1853.  
*Eschequer.*  
 BUTLEDGE  
 v.  
 HOOD.

(a) 2 Sch. & Lef. 556.

(b) 6 Ir. Eq. Rep. 569.

M. T. 1853. *Exchequer.* Estates Court,—A returns within twenty years—is this Court prepared to say that A shall be without a remedy?—[GREENE, B. Suppose an estate to be sold in England by the Commissioners, or in some manner sold without any petition having being presented, or that Blackacre has been sold instead of Whiteacre—many extreme cases may be put—and it would appear to be a startling proposition to say there was no redress in such cases; but how do you meet the 15th section, that enables the Commissioners to ascertain the incumbrances?—It is controlled by the 19th section, that enacts that the incumbrance must affect the inheritance, or a term of fifty years unexpired.—[PIGOT, C. B. The Commissioners must have ascertained that the previous sums had been paid off, or in point of fact, that the estate had not been onerated beyond the extent of the power, or that in point of law it was a charge; in either case the proceedings of the Court are inviolable.]

*Longfield*, in reply.

It is a Court of exclusive jurisdiction—ss. 15, 21, 27, 49, 50, 51. By the 50th section, the writ of prohibition is taken away (a writ that is only applicable in cases of excess of jurisdiction), also of injunction and mandamus; nor shall proceedings before them be removeable by *certiorari*. Their acts not being examinable by any other Court, they are conclusive.—[PENNEFATHER, B. Do you argue the question, put by the other side, that if a party mortgage an estate which is not his own, the real owner being abroad, a conveyance from the Commissioners would be indefeasible?—It may not be necessary to argue it, but I go that length.—[PENNEFATHER, B. My opinion at present is very strong against that view, but it may not be necessary to decide it.]—The Commissioners have jurisdiction to ascertain the incumbrances affecting the inheritance, and their jurisdiction being exclusive, their decision as to them cannot be questioned; their judgment upon the case is a judgment *in rem*, and is conclusive. Even in case of an erroneous judgment, it is not subject to review, except with the permission of the Commissioners. Great public inconvenience would arise after the Commission has closed, if the acts

of the Court were not final. As to the order of the Commissioners being a judgment *in rem*, they are a Court of Record, and are authorised by sections 22 & 27 to decide upon the rights of every person, even her Majesty; their decision is therefore a judgment *in rem*, and conclusive against the whole world. *Trevivan v. Lawrence* (a), approved of by the Common Pleas, in *Magrath v. Hardy* (b), was cited to show when an estoppel may be relied on, although not pleaded.—[PENNEFATHER, B. How do you distinguish an order of the Incumbered Estates Court from a decree of the Court of Chancery, ordering lands to be sold, and which I never heard was considered a judgment *in rem*?]—But, at all events, whether wisely or not, the Legislature have made the orders of the Commissioners conclusive. If the Court decide, on the particular facts of this case, against the plaintiff, that decision involves another, namely, that they have the power of examining the acts of the Commissioners, while it is contended they have no such power. Sections 15, 21, 49, 50 & 51 show their acts are not examinable; the two first of these sections alone show their jurisdiction is conclusive. This Court has no power to question directly the acts of the Commissioners; it cannot, therefore, do so indirectly.—[PENNEFATHER, B. How do you explain the provision, “such conveyance,” in the 27th section?—“Such conveyance” refers to a conveyance executed by the Commissioners in the manner prescribed by the 24th section, under their seal, &c. Section 42 also shows the exclusive jurisdiction of the Commissioners; it enacts that after an order for sale of any lands by the Commissioners, proceedings for a sale under a decree to be stayed, and no suit, &c., to be commenced without leave of the Commissioners, pending proceedings under the Incumbered Estates Act. The acts of Commissioners holding similar powers have been always held to be conclusive. In *Moody v. Thurston* (c), Commissioners were empowered, under an Act for stating the debts of an army, to decide whether money was due from one officer or agent to another, and give a certificate accordingly, upon which the party was enabled to sue. The plain-

M. T. 1853.  
*Exchequer.*  
 RUTLEDGE  
 v.  
 HOOD.

(a) 2 Smith's Lead. Cas. 444 (last ed.).

(b) 4 Bing. N. C. 782.

(c) 1 Strange, 481.

M. T. 1853.

*Exchequer.*

RUTLEDGE

v.

HOOD.

tiff produced a certificate as evidence of the debt, and although the defendant offered in evidence his accounts, by which he said it would appear he had at that time no money in his hands, and stated that the certificate had been made by the Commissioners on the first summons, who had never heard him. Chief Justice Pratt held that the certificate was conclusive; and upon a motion for a new trial, all the Court were of the same opinion. That the decision of Commissioners, so empowered, is without appeal, has been established by recent authorities. In the *Earl of Radnor v. Reeve* (a), Commissioners of Appeal, under 25 G. 3, c. 43, s. 35, having dismissed an appeal, an action was brought to try the same question, but the Court decided, "that when a statute provides that "the judgment of Commissioners appointed thereby shall be final, "their decision is conclusive, and cannot be questioned in any "collateral way."—[PENNEFATHER, B. I consider those cases are not in point, for in them the acts complained of were within the jurisdiction of the Court.]—In *Britain v. Kinnaird* (b), a magistrate's conviction, under the Bum-boat Act, was questioned, in an action of trespass, upon the grounds that the vessel in question was not a boat within the meaning of the Act. Dallas, C. J., said, "Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a "magistrate seizing a ship of seventy-four guns, and calling it a "boat. Suppose such a thing done, the conviction is still conclusive, "and we cannot look out of it." In *Allen v. Sharp* (c), where a party was assessed to the duty imposed upon "horse-dealers," it was held, that the decision of the assessor, that the party was a horse-dealer, however erroneous, could not be questioned in an action. Parke, B., said, "In like manner, if a statute gives magistrates "jurisdiction to decide in a certain manner, and they, having the "facts before them, do decide it, the propriety of their judgment "cannot be inquired into, although they may have come to an "erroneous conclusion." The very thing to be decided in this case was whether it was or not an incumbered estate, and was precisely

(a) 2 Bos. &amp; P. 391.

(b) 1 Brod. &amp; Bing. 433.

(c) 2 Exch. 352.

similar to the questions in the last two cases.—[GREENE, B. The question in all these cases is not whether the decision was right or wrong, but whether the party making it had jurisdiction to enter into the inquiry. It was so decided in *The Queen v. Bolton* (a).—PENNEFATHER, B. And so the question in the case suggested by Mr. *Bourke* would be, were the Commissioners acting within their jurisdiction when they decided upon incumbrances, where the property belonged to a third party?—If the Court can allow such a question to be raised, no effect is given to the 49th section of the Act.—[PIGOT, C. B. Suppose the Commissioners had decided that a horse was a boat, and sold it as such, would that be conclusive?—I think so. The Legislature had the power of making the conveyance conclusive; and it is submitted that stronger words than those in the 49th section could not have been used.—[PENNEFATHER, B. It might have provided thus:—"The sale shall be conclusive, whether the land has been incumbered by the owner or not."—The words of the section are quite as forcible.—[GREENE, B. Your argument must go to this—that the conveyance is conclusive as to their jurisdiction.]—Certainly, it is conclusive that every thing has been rightly done.—[PIGOT, C. B. In *Allen v. Sharpe* (b), the case is laid down exactly by Baron Rolfe; he says, "Sir Frederick Thessiger seemed to think it somewhat anomalous, "that an assessment in respect of a particular character, in which a "party was not liable to be assessed, could not be questioned in an "action, inasmuch as the effect would be to enable the officer to give "himself jurisdiction. But our decision is not that an assessment "made without jurisdiction will bind." When the act is within the jurisdiction of the Court, it is not examinable, but it is otherwise when its jurisdiction is exceeded. Baron Parke, though not so emphatically, lays down the same proposition.—PENNEFATHER, B. It is not merely the *dicta* of those learned Judges, but the entire current of authority, that the Courts can examine, where the act has been done without jurisdiction.]—If you decide that the Commissioners have acted in this case properly, you may in another decide that they acted improperly, and so assume a complete

M. T. 1853.  
Exchequer.  
 RUTLEDGE  
 v.  
 HOOD.

(a) 1 Q. B. 66.

(b) 2 Exch. 353.

M. T. 1853. jurisdiction over them, notwithstanding the provisions of sections  
*Eschequer.* 27 and 50. The Commissioners are not liable to an action for any  
 act, done even in the *supposed* exercise of their powers, by section  
 50, that is, where they are acting without jurisdiction.—[PENNE-  
 FATHER, B. The effect of acts of the Commissioners, done without  
 jurisdiction, does not properly arise here; our decision upon it  
 would be extrajudicial, and not worth any thing.]—If the Court  
 decides that the Commissioners acted within their jurisdiction, and  
 therefore, that their conveyance is conclusive, it is a decision  
 that the acts of the Commissioners are examinable by this Court,  
 and being examinable, it follows they may be affirmed or reversed.

RUTLEDGE  
 v.  
 HOOD.

PIGOT, C. B.

After the full discussion this case has received, we do not think it necessary or right to allow it to stand over for any time, before pronouncing our decision upon it; for we must take care that no idea gets abroad, that in matters coming within the large jurisdiction of the Commissioners of the Incumbered Estates Court, their decisions are to be unravelled by a Court of Law. In the present instance, as I have stated in the course of the argument, the plaintiff's case involves these two propositions:—The first is, that upon a certain state of facts, in which the Commissioners of Incumbered Estates Court possess no jurisdiction, under the provisions of the Act of Parliament from which their powers are derived, their conveyance does not confer a valid title upon a purchaser; and the second—that upon the peculiar state of facts presented on the trial of the present case, this Court must be of opinion that the Commissioners did not possess jurisdiction. Now both these propositions must be established by the plaintiff before he can succeed; and if the Court be of opinion that the plaintiff has failed to establish both propositions, it will be our duty to give judgment for the defendant; and any further expression of opinion by the Court, upon any abstract proposition, as to the general powers of the Commissioners, would be uncalled for on our part, and extrajudicial. These two propositions form the major and minor of a syllogism; and the plaintiff must make out both before the conclusion can be drawn, that in

the present case, the conveyance by the Commissioners did not confer a valid title to the person who has become the purchaser. For the purpose of establishing these two propositions, the plaintiff has availed himself of the following arguments, founded upon the evidence that he produced:—that the incumbrance must have been created in execution of a power conferred upon the tenant for life, by an instrument dealing with the inheritance, and that the only operation of that power was to give the tenant for life a right to charge four times the annual value of the estate upon the inheritance; and it was alleged that the power had been exercised to its full extent, and was exhausted at the time of the execution of the instrument creating the incumbrance of the petitioner in the Incumbered Estates Court, and therefore that that instrument failed to create a charge upon the inheritance. For the purposes of this case, and of my judgment, I shall assume that the plaintiff has established that state of facts, and that at the time of the order of the Commissioners, there had been a charge imposed upon the inheritance prior to the charge of the petitioners, which, if it continued unpaid, had exhausted the power. Now, it appears to me that the plaintiff has established, in evidence, the fact that there was an estate of inheritance, and a power to charge it to the extent of four times its annual value, and a dealing with the estate, by means of which a charge was purported to be created, and was created, subject to the consideration of what previous charges had been created in exercise of the power. On that state of facts, it appears perfectly plain that the Commissioners did possess jurisdiction to entertain the question of whether or not there was an incumbrance affecting the inheritance; and it is equally plain, under the express provisions of the Act, that no matter how wrong the Commissioners may have been in their decision or procedure, their jurisdiction attaching the sale is clearly final and conclusive. I will, therefore, assume that the tenant for life had, by various acts, exhausted the power of charging the inheritance, and had no right to create the incumbrance in question, if the previous incumbrances still affected the lands; but if the previous incumbrances had been paid off, then this instrument would have charged the estate; and it has been

M. T. 1853.

*Exchequer.*

RUTLEDGE

v.

HOOD.



M. T. 1853. *Exchequer.*  
RUTLEDGE  
v.  
HOOD.

contended, that even though the previous charges had not been paid off, this instrument would have created a charge on the inheritance. Now, such being the state of things, it is plain that the jurisdiction of the Commissioners is sufficient for the purpose of enabling them to determine whether or not the previous acts of the tenant for life did, or did not, amount to an execution of that power; and whether they failed in coming to a right conclusion, through neglect of duty (a supposition that cannot, for one moment, be entertained), or through mistake, which may befall any tribunal, or from any other cause, I think we could not interfere, but are bound to consider their decision as final, and not to allow any person to question its validity, no matter how great the hardship of the case may be. It is precisely one of those cases which is closed from investigation by the express provisions of the Legislature, and that this Court, therefore, possesses no authority whatever to inquire into the question that has been submitted to it. It is most important that there should be no doubt existing in the public mind as to the validity of the titles conferred by the Commissioners, and that no encouragement should be held forth to any party to attempt to shake these titles. Suppose a case of this nature to arise—and it is a state of facts that might easily occur—that an estate is incumbered by many mortgages, and that a mortgagee, whose mortgage was *puise* to the others, presented a petition in the Incumbered Estates Court, and that it was subsequently discovered that the petitioner was paid off the amount of his demand before he presented the petition—in fact, that he had no incumbrance, could this Court, after there had been an investigation by the Commissioners of the Incumbered Estates Court, as to the existence of the incumbrance, and their decision that it was a good incumbrance, and after a sale and a conveyance to a purchaser, hold that these proceedings could be unravelled, in order to see whether or not there was any thing due on foot of the mortgage? That was one of the very things that it was intended by the statute to avoid. The question of an incumbrance, the Commissioners are clearly empowered to decide; they have all the powers of a Court of Equity in ascertaining incumbrances, and that is what they have done in the present instance. There

was an alleged incumbrance, created by a settlement in this case, with questions arising in relation to it, and also on the decrees of the Court of Chancery; it may have been a voluntary instrument, or the power created by it may have been exhausted; but these were matters within the jurisdiction of the Incumbered Estates Court, and, their jurisdiction attaching, their orders were conclusive. If there was any question in this case, as to the existence of an incumbrance sufficient to give the Commissioners jurisdiction to proceed, it appears to have been removed by the decree of the Court of Chancery, a competent Court clearly, that it was an incumbrance affecting the inheritance. That was one of the questions entertained and decided in the Chancery cause; and although I do not intend to call in aid the decrees of the Court of Chancery in deciding the present question, still I may say, that where the Incumbered Estates Court and the Court of Chancery have concurred in their decisions, as to an incumbrance, it is going very far to suppose we could entertain a doubt as to this case being within their jurisdiction. That being so, with respect to the minor proposition, we are called on to consider the major, whether, upon a certain state of facts, the title conferred by the conveyance from the Commissioners is indefeasible; and it has been strongly urged upon us, that we cannot refuse to decide this question, whether, if there had been no incumbrance, or no estate of inheritance, the decision of the Commissioners would have been examinable in a Court of Law. It is contended that, in deciding the other proposition, we decide that we have jurisdiction to examine the proceedings of the Incumbered Estates Court; I do not think so: what we decide here is, that there was an estate of inheritance, and an incumbrance affecting that estate, sufficient for the jurisdiction of the Incumbered Estates Court to attach upon; and therefore, the proceedings of that Court, being within its jurisdiction, are final; and it appears to me quite impossible to infer from that decision that we have decided that, under a different state of circumstances, we should hold that the jurisdiction of the Incumbered Estates Court did not attach, and that the proceedings in that Court were examinable. If we did

M. T. 1853.

*Eschequer.*

RUTLEDGE

v.

HOOD.

M. T. 1853.

*Exchequer.*

RUTLEDGE

v.

HOOD.

so decide in the present case, in which the question does not properly arise, our decision would be extrajudicial, and perfectly worthless as a precedent. We do not decide that the Commissioners of the Incumbered Estates Court can sell the estate of one man for the debt of another—neither do we decide the reverse; we do not say that the conveyance determines the question of jurisdiction in such cases—on the contrary, we desire that; it should not be supposed that our present decision contemplates such a state of things, and we pronounce no decision upon such a case. Upon these grounds, therefore, we are of opinion that the defendant is entitled to judgment, not because it has been proved to our satisfaction that there did not exist a debt that exhausted the power, but because we are satisfied that there existed such a state of facts, that the jurisdiction of the Incumbered Estates Court did attach; and that being the case, that the decision of the Commissioners was conclusive.

PENNEFATHER, B.

I entirely concur in the judgment of the CHIEF BARON, and in the view he has taken of this case. It is clear that this was a case within the jurisdiction of the Commissioners. There appears to have been an estate of inheritance, and an incumbrance affecting, or purporting to affect, that estate, and the Commissioners were called upon to ascertain and decide whether or not the incumbrance of the petitioner was a subsisting incumbrance. That was their province; and we are not at liberty to examine that question, and to take into consideration in what manner they ascertained and decided it, or whether they sold too much, or not enough, of the estate. So long as they act within the limits of their jurisdiction, their orders are not to be examined in any manner, or by any Court whatsoever. They appear to have acted within their jurisdiction, and in such a case a conveyance executed by two of them gives a good title against all the world. I wish it to be understood distinctly that I do not rest my judgment in any manner upon the decrees pronounced by the Court of Chancery. The decision of the Commissioners may or may not have been influenced by them, but in my

opinion, they do not affect the present case. It is sufficient for me that the Commissioners were entitled to ascertain and decide upon the existence of the incumbrance, and that they did so. Under these circumstances, I am of opinion that the defendant is entitled to judgment. But we have been called upon to decide a question upon a state of facts widely differing from those in the present case, and we have been told that it is imperative upon us to say what would be the effect of a conveyance executed by the Commissioners, of the estate of one man sold for the purpose of discharging the debt of another, or in other words, what would be the effect of a sale of my property by the Commissioners, because another person happened to owe a debt, which somehow was supposed to affect my property. I do not think we are called on, in the present case, to give any opinion upon the question that would arise on such a state of facts; and the argument by which that proposition was pressed upon us appears to me to be quite unfounded. We have expressed an opinion that there did exist a jurisdiction in the Commissioners for what they did, and that being the case, that the conveyance was a valid one; and it is urged, that it follows, as a corollary from that proposition, that if we have so decided in this case, we must have pronounced a decision, if the facts had been such, that the Commissioners had no jurisdiction; but I cannot see the logic of that argument. Whenever that question arises, there will be a great deal to be said upon both sides, but at present we are not bound to give any opinion upon it, and I have a very strong opinion that to do so would be extrajudicial and improper. Because we have decided upon a case in which the Commissioners had jurisdiction, that we should therefore decide, upon a different state of things, where they have not jurisdiction, appears to me illogical and unfounded, and I fully agree with my LORD CHIEF BARON, that to express any opinion, upon such a state of things, would be extrajudicial and of no authority, and I desire to guard myself from being supposed to intimate any opinion upon such a case.

M. T. 1853.

*Exchequer.*

RUTLEDGE

v.

HOOD.

GREENE, B.

The learned Judge who tried this case directed the jury to find

M. T. 1853.

*Exchequer.*

RUTLEDGE

v.

HOOD.

a verdict for the defendant, telling them that he was of opinion that the conveyance of the Commissioners was indefeasible; and we are now called upon by this motion to set aside the verdict, on the ground that the learned Judge did not state the law correctly to the jury in that respect. That is the only question we have to decide, and it is impossible to have heard the judgments of the LORD CHIEF BARON, and my Brother PENNEFATHER, without concluding at once that the direction of the learned Judge who tried the case was correct. I have no hesitation in expressing my opinion that the direction was right; and having stated so much, I think it would be improper, and going beyond what the Court is called on to decide, if we undertook to determine what would be the effect of a conveyance by the Commissioners under different circumstances. I do not say, if such a question did arise, that I am not prepared to express my opinion, but I shall not do so at present, as the question does not arise. It would be extrajudicial and improper to pronounce a judgment upon that imaginary case. I therefore concur with the rest of the Court, in abstaining from doing so. I am of opinion that the defendant is entitled to judgment, and therefore that the cause shown should be allowed.

Cause allowed.

## SCOTT v. GREAT WESTERN RAILWAY COMPANY.

Nov. 7, 16.

A plaintiff in error must enter into a recognizance in a sum sufficient to cover double the amount of the taxed costs of the opposite party, as well as double the amount of his damages; and if the recognizance fall short of that sum, the party who has obtained judgment below will be allowed to issue execution on foot of it.

FITZGIBBON (with whom was *Richards*) moved to vary an order made in this cause, by Baron PENNEFATHER, in chamber. A writ of error had been brought by the defendant, notice of which, together with notice of bail in error, and a draft of the recognizances, filled up for £1628, had been served upon the plaintiff's attorney. The damages in the original action against the defendants were

£700, with £127. 19s. 0d., the costs served, but not taxed. A summons to tax the costs stood for the 24th of June last; but if the defendants had deferred putting in bail in error until after that period, they would have been late. The costs, therefore, being unascertained, the defendants' attorney inserted the single amount only of the sum which was furnished, instead of the double. This was the miscarriage complained of, upon which a motion, that the plaintiff should be at liberty to issue execution for his damages and costs, was granted in chamber. The recognizances ought to have been in £87 more, under 1 G. 4, c. 68, s. 4; and we offered to amend, upon the discovery of the error. The entire sum was now lodged in Court; and there was a cross notice by plaintiff, for leave to draw out the amount of his execution, with interest and costs: *Power v. Hayden (a)*; *O'Shaughnessy v. Hayden (b)*.

M. T. 1853.

Exchequer.

SCOTT

v.

GT. W.

RAILWAY  
COMPANY.

*Otway* (with him *Duggan*), contra.

The sum recovered by the plaintiff is the damages and taxed costs, and the recognizances should be double of those; unless, therefore, proper bail has been put in, the plaintiff is entitled to issue his execution: *Gildea v. Costello (c)*; *Yeo. & B.*, p. 343; 2 *Tidd*, p. 1155.

*Richards*, in reply.

The defendant has sufficiently complied with the statute. Suppose the plaintiff below insolvent, he might, if plaintiff's argument be correct, without taxing his costs, issue execution, and thereby practically deprive the defendant of the benefit of the statute.

FIGOT, C. B.

This case must be decided by the practice of the Court; for I do not think it is withdrawn from the general rule by any special circumstances. I do not think the defendants were misled by the plaintiff's attorney. There was no bad faith on his part; if it were so, it might have the effect of depriving the plaintiff of the benefit of the rule. But there was no intention on his part to mislead, and no responsibility to instruct the defendants. Nor is

Nov. 16.

(a) Bat. 45.

(b) Sm. &amp; B. 208.

(c) 2 Saund. 101, P. N. F.

M. T. 1853.  
*Exchequer.*  
 SCOTT  
 v.  
 GT. W.  
 RAILWAY  
 COMPANY.

the case withdrawn by the consideration that the full amount of the money has been lodged in Court. It was a very proper order that the defendants should do so; and I am of opinion that that order cannot be set aside on the practice of the Court. If this were *res nova*, I should think that the sound exposition of the Act would be, that if the writ of error issued before the costs were taxed, it should be a sufficient security to lodge double the amount then on the roll; a blank is left on the roll for the costs, until taxed, and a party may issue execution for the amount of his judgment, exclusive of costs.

The sum on the record, therefore, might properly be the measure of the bail. This might be attended with inconvenience to the plaintiff, no doubt. But a still greater inconvenience arises to the defendant from the present practice. He must now, to avoid the possibility of execution issuing, give bail in error, before the costs are taxed. It is impossible, in most cases, to have the costs taxed in four days. The plaintiff is not even bound to serve them within that time; and the defendant has no power of taxing them so soon. The effect is, that he is exposed to the peril of an execution; for it is impossible for him to enter into exactly the proper recognizance. I can see a course by which the inconvenience on both sides might be removed. It is worth consideration, whether a rule might not be made, by which the plaintiff in such case should be bound to intimate that he either intends to forego his costs, or to tax them, and not to issue execution until they are taxed. We must now, however, be bound by the practice of the Court; on matters of practice especially, where it has been long established, one should distrust his own judgment; and even if a rule appear to be not absolutely correct in principle, it is better to abide by it than to unsettle an established practice.

PENNEFATHER, B.

The order I made was in accordance with what I thought the settled practice of the Court. Difficulties may exist in it; but if so, they require either the interposition of the Legislature, or the exercise of the authority of the Judges, to remove them. I give no opinion on the question whether the sum recovered is the dam-

ages alone, or includes the taxed costs. The writ of error in this case issued before the costs were taxed. What then was the form of entry on the record? It was, that the plaintiff do recover a certain ascertained sum for his damages, and an unascertained sum for his costs, for which a blank was left. While the entry stood thus, it was no judgment at all; for a judgment must be for a sum certain, and not for an unascertained sum; and I think, in that state of the record, no execution could issue. I think the record must first be made up by introducing the costs, or the party must abandon his costs on the record; and if he do so, the damages are then the sum certain, and then he may issue execution. In this case the execution was not taken out until the costs were introduced. Then the judgment being for the amount of damages and costs, is this recognizance in double the amount of the sum recovered?

M. T. 1863.  
*Exchequer.*  
 SCOTT  
 v.  
 GT. W.  
 RAILWAY  
 COMPANY.

It is said the defendant is exposed to inconvenience because the plaintiff may issue execution against him; and to guard against that, he must give a recognizance for double the costs, before he ascertains their amount. But the defendant may guard himself, by entering into a recognizance in a sufficient sum, to cover double the amount of costs, whatever they may be. I do not think that is a greater hardship on him than the plaintiff would be subject to in having no security for his costs at all. The difficulty is not such as may not easily be overcome, and might have been in this case; but, in truth, both attorneys were ignorant of the precise sum for which bail should have been given.

GREENE, B., intimated his concurrence in the judgment and reasoning of Baron PENNEFATHER.\*

Order:—That plaintiff should be entitled to draw out of Court the amount of his execution, with interest to the date of this order, and costs.

\* NOTE.—Vide *Blackburne v. Kymer* (1 Marsh, 278; 5 Taunt. 672), from which it appears that the four days for putting in bail are to be reckoned from the time when the taxation of the costs is completed, by the insertion of that sum on the roll.



M. T. 1853.

Exchequer.

## WILCOX v. LOWE.

Nov. 8.

This Court, on motion, allowed the erroneous re-docketing of a judgment of 1837 to be amended, in order that it might retain its priority over a subsequent judgment of 1840, properly re-docketed, to which it would otherwise have been postponed, through the operation of a mortgage of 1847. But it distinctly appeared on affidavit, and by a schedule of incumbrances, filed in the Incumbered Estates Court, that the interest of the mortgagee of 1847 was not prejudiced by the amendment, inasmuch as the proceeds of the debtor's estate, from intervening incumbrances, fell short of reaching his claim in any case.

FITZGIBSON (with whom was *Darley*) applied to amend the re-docketing of a judgment of 1837, entered against Richard Butler Hamilton Lowe, in the re-docketing book erroneously spelled "Lawe." He cited *O'Connor v. M'Dermott* (a), and relied on an affidavit averring notice of the judgment to a mortgagee of 1847.

*Wall* (with *T. R. Henn*), for a judgment creditor of 1846, *contra*.

If this motion be granted, we shall lose our priority, which we have obtained through a subsequent mortgage of 1847. The principle is that which is applied to the case of allowing a judgment to be entered *nunc pro tunc*, viz., that the priorities of other parties shall not be affected by it: *Martin v. M'Causland* (b); 1 *Ferg. Prac.*, p. 381; *Smith v. Keily* (c); *Woodward v. Burton* (d); *Patterson v. M'Clatchie* (e).

*Darley*, in reply.

The distinction between amending the original entry of the judgment on the roll, and the entry in the re-docketing book, is not sufficiently kept in view; because even if the judgment were not re-docketed at all, it would have its priority over the subsequent judgment *per se*. Then the judgment creditor of 1846 relies on a subsequent mortgage, to which an un-redocketed judgment would be postponed, to carry him up along with it; but our affidavit states that the mortgagee had notice of our judgment, and along with a schedule of incumbrances, filed in the Incumbered Estates Court, shows, that from intervening incumbrances the mortgagee of 1847 has no interest in the question, for the proceeds

(a) 1 Wils. 61.

(b) Smyth, 271.

(c) Batty, 568.

(d) Glas. 125.

(e) 2 Law Rec., N. S., 80.

of the debtor's estate will fall short of reaching him, by £10,000. The mortgage of 1842 does not affect the priorities, because that comes under Moore's Act, under which a judgment registered within twenty years is good against a purchaser; and Lord St. Leonards' Act is not retrospective: *Re Huthwaite* (a). By this amendment, the right of no intervening creditor can be prejudiced; and it is not denied that the Court has the power to make it.

M. T. 1853.  
Eschequer.  
 WILCOX  
 v.  
 LOWE.

PIGOT, C. B.

What we are asked by this motion is, not to change the position of the parties, but to leave them as they are. What is sought by those who resist the application is to have a new right conferred on them by the execution of the mortgage of 1847. The circumstances of the case are peculiar. The only property subject to these various charges has been sold; and the amount realised can never, by any possibility, reach the mortgage of 1847. So that the case may be considered as if that mortgage never existed, and as if we had only to deal with that of 1842, and the different judgments. In that state of things, the result would be, that no one could be prejudiced by the amendment. The mortgagee of 1842 would not, because there is no need of the judgment being re-docketed as to him. The judgment creditors are not, because their positions *inter se* are unaffected by the Re-docketing Act. The only question, therefore, is whether the later judgment creditors are to be treated as having acquired a position, as to the judgment of 1837, through the mortgage of 1847, which, to the mortgagee of that mortgage, is entirely fruitless. We may treat this case as if the application had been made in 1844. At that time the position of the judgment creditor of 1837 was unaffected, as to the other judgments, by the Re-docketing Acts; and at that time the subsequent judgment creditor could not have resisted the motion. Can it then be said, that the creditor who, by the force of his own security, possesses no right, can acquire one from the existence of a mortgage entirely worthless to its owner? In that view, this case is distinguishable; for the question has always been one between

(a) 4 Ir. Jur. 61.

M. T. 1853. judgment creditors and purchasers, or mortgagees, and depended  
*Exchequer.* on this—whether the rights of the latter could be prejudiced.  
WILCOX But this judgment creditor *per se* had not any right resulting  
v. from this faulty re-docketing, which we are called on to amend,  
LOWE. and therefore no right to resist the amendment. It is a misprision  
of the officer of the Court; and the mortgagee of 1847 being,  
under the circumstances, unaffected by the proposed amendment,  
the judgment creditor of 1846 cannot, solely by reason of the  
existence of such mortgage, resist it.

PENNEFATHER, B.

The argument of Mr. *Darley* is perfectly well founded. It would be a very different thing to amend the original roll, because that might affect the independent rights of judgment creditors. But we are asked to amend only the registry; and judgment creditors derive aid from it only through a mortgage or purchase. The mortgagee of 1847 has no interest in the question, because the fund confessedly falls short of reaching by £10,000. It would be strange if a judgment creditor, who *per se* has no interest, could acquire one through a mortgagee who has no interest, and thereby alter his relative position to a party who, but for such mortgage, must come before him. We think we ought to correct the misprision of the officer, when by doing so we do not affect the independent rights of parties.

GREENE, B.

I concur. It is not argued that the Court has not jurisdiction to make the amendment; and although it will not exercise such jurisdiction, to the prejudice of parties who are not before it, yet if it see that no person can be prejudiced, it will do so. I concur with the rest of the Court, that no one has appeared on this motion who has a right to resist it; and that no absent party is prejudiced by its being granted.

Motion granted, without costs.

E. T. 1854.

Eschequer.

COLLINS

v.

LORD FRANKFORT DE MONTMORENCY.

*April 20.*

CLARKE applied for an order to substitute service of the writ of summons and plaint in this case, on the land and law agent of the defendant, who had property in this country, but resided out of the jurisdiction. The action was brought on an English judgment obtained against the defendant, who resided in chambers in London. He had no property there, against which the judgment could be made available, and the object was to make it available against his property in this country.

The Court has no power to substitute service on a defendant residing out of the jurisdiction of the Court, in a case in which the cause of action has arisen out of its jurisdiction.

*Rogers*, contra, resisted the motion, on the ground that under section 34 of the Common Law Procedure Act, the Court had no jurisdiction to substitute service, unless where the cause of action arose within its jurisdiction. Here the cause of action was an English judgment.

PIGOT, C. B.

This case exemplifies the mischiefs which may be produced by changes in the law, without sufficiently attending to consequences. Under the late Act, as well as under the state of the law previous to it, we could have made this order so as to attain justice between the parties. But the present Act expressly restricts the power of the Court to cases in which the cause of action has arisen within its jurisdiction. The 31st section, by negative words, takes away the power of effecting service out of the jurisdiction of the Court, and the 34th section prescribes the cases in which the Court may make an order to substitute. This case is not within those, as both the defendants reside, and the cause of action has arisen, out of its jurisdiction. The object, perhaps, of the restrictive words

E. T. 1854. *Exchequer.*  
COLLINS  
v.  
LORD  
DE MONT-  
MORENCY. was, to prevent the possibility of actions being brought here, when both parties resided in England, and the defendant had property in this country. Vast inconvenience would certainly arise from such a state of the law; and whether any such change is in contemplation, I shall not here discuss. But it is plain, that in a desire to prevent such a consequence, the Legislature did not advert to the possibility of a judgment in England between parties resident there—the defendant having little or no property in that country, but ample here: such a judgment, under the present state of the law, can in no way be made available against property in this country, and the person of the defendant (a peer) in this instance is privileged from arrest.

PENNEFATHER and GREENE, B.B., concurred.

Conditional order discharged.

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1853.  
H. of Lords.

House of Lords.

ANDERSON, Appellant; FITZGERALD, Respondent.\*

(Writ of Error from the Exchequer Chamber in Ireland).

July 4, 14.

THIS was a writ of error on a judgment of the Exchequer Chamber in Ireland, which affirmed a judgment of the Court of Exchequer in Ireland, on a bill of exceptions for misdirection. It was an action of assumpsit on a policy, by the personal representative of the assured, against one of the directors of the United Kingdom Life Assurance Company.—[The facts are fully stated in the report of the case in the Exchequer Chamber, 1 *Ir. Law Rep.*, p. 251.]

F. proposed his life for insurance, and signed a form of proposal, which contained his answers to twenty-seven questions, the twenty-first and twenty-second of which were as follows:—"21.—

Did any of the party's near relations die of consumption or any other pulmonary complaint?—Answer, No"—"22. Has the party's life been accepted or refused at any office? &c.—Answer, No." The proposal also contained the following agreement:—"I hereby agree, that the particulars mentioned in the above proposal shall form the basis of the contract between the assured and the Company; and if there be any fraudulent concealment, or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said Company, or there shall be any fraud or mis-statement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void." The policy contained a warranty on the part of F., as to most of the facts, replied to in the proposal, but not as to questions 21 and 22. It then provided that the policy should be null and void, and all moneys paid by F. forfeited, upon F. dying in certain enumerated modes; "or if any thing so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said Company, or if any fraud shall have been practised upon the said Company, or any false statement made to them in or about the obtaining or effecting of this insurance." Upon an action on the policy against the Company, it appeared that the answers to questions 21 and 22 were not true:—*Held*, reversing the decisions of the Courts of Exchequer and Exchequer Chamber in Ireland, that the Judge was wrong in directing the jury, that if they found the statements both *false and material*, they should find a verdict for the defendants; and that the questions which the Judge ought to have left to the jury were—first, were the statements false; and secondly, were they made in obtaining or effecting the policy?

Observations on the form of this policy and its ambiguity, and the effect of making *some* of the statements in the proposal matters of warranty—*per* Lord St. Leonards.

A bill of exceptions should state what directions the Judge gave on the particular issue raised, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions.—*Per* the Judges.

\* Before the LORD CHANCELLOR (LORD CRANWORTH), LORD BROUGHAM and LORD ST. LEONARDS, assisted by PARKE, PLATT, ALDERSON & MARTIN, B.B.; COLERIDGE, WIGHTMAN, WILLIAMS, ERLE, CRESSWELL, TALFOURD and CROMPTON, J.J.

1853.  
H. of Lords.  
ANDERSON  
v.  
FITZGERALD.

Sir *F. Kelly* and *Bovill*, for the plaintiff in error.

*Napier* and *Fitzgerald* (of the Irish Bar), for the defendant in error.

The following authorities were cited:—*Duckett v. Williams* (a); *Geach v. Ingall* (b); *Pawson v. Watson* (c); *Seanlan v. Sceales* (d), and *Borradaile v. Hunter* (e).

At the conclusion of the arguments, the following questions were put for the opinion of the Judges:—

“First, was it necessary for the plaintiff in error to prove on the trial, that the answers given by Fitzgerald to questions twenty-one and twenty-two, contained in the proposal dated ‘Kilrush, 17th of June 1846,’ or either of them, were or was material as well as false?”

“Secondly, if it was necessary for the plaintiff in error to prove the materiality as well as the falsehood of the answers, or either of them, are the exceptions, so far as they relate to the ruling of the learned Judge, on the issues joined on the second and third pleas, or either of them, sustainable?”

PARKE, B., on behalf of the Judges, requested time to consider.

July 4.

PARKE, B., now delivered the unanimous opinion of the Judges, as follows:—

Your Lordships have proposed two questions for the consideration of those of her Majesty's Judges who heard the argument of the case at your Lordships' bar. The first is—Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, contained in the proposal dated “Kilrush, 17th of June 1846,” or either of them, were or was material as well as false? I have to state, that we have considered with due attention the very able

(a) 2 Cr. & M. 348.

(b) 14 M. & W. 95.

(c) In note to *Bean v. Stupart*, 1 Dougl. 12; also Cowp. 785.

(d) 6 Ir. Law Rep. 367.

(e) 5 Scott's N. R. 418.

arguments, both at your Lordships' bar and in the judgments of the Irish Judges, which are fully reported in the printed cases laid before us, and that we find ourselves unable to agree in the conclusion at which the majority of those Judges have arrived.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

The answers referred to by your Lordships were given to two questions put to the assured, Fitzgerald:—the first, whether any of the party's near relatives died of consumption, or other pulmonary complaint? and secondly, whether the party's life had been accepted or refused at any other office; and if accepted, whether at the usual premium, or with what addition? To both the assured answered in the negative. At the end of the list of questions, the assured subscribed a declaration, to the effect that the particulars should form the basis of the contract between the assured and the Company, and that if there were any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the Company, or if there should be any fraud or mis-statement, all the money paid on account of the insurance should be forfeited, and the policy should be void.

The first question then submitted to us is, whether it was necessary for the plaintiff in error to prove on the trial that the above answers, or either of them, were or was material as well as false? We are all of opinion that it was not. This question does not appear to us to turn upon the well-known distinction between warranties and representations, laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties, irrespective of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso, the policy is unquestionably void. The case, therefore, resolves itself, in our view of it, as it does in that of most of the Irish Judges, simply into a question of the construction of the proviso itself; and it is upon questions of that nature that different minds are apt to differ in their conclusions, however disposed to adopt the established rules for the construction of



1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

written instruments. By that proviso it is stipulated, first, that if the assured should die on the high seas (with certain exceptions), or should kill himself, or die by duelling, &c., or if any thing warranted as before mentioned (and there were several express warranties before stated) should not be true, or if any circumstance material to that insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the Company, the policy should be void. Thus far the condition applies only to material matters; but it proceeds to declare, obviously with a view of extending the protection of the office still further, that if any fraud shall have been practised on the Company, or any false statements made to them, in or about the obtaining or effecting of that insurance, the policy shall be null and void. The latter words probably override the former; and the fraud, as well as the false statement, in order to avoid the policy, must be made in or about the obtaining or effecting of that insurance. These words, no doubt, must be understood not to include a false statement of matters to the disparagement of the applicant for insurance, and tending to render his life less insurable; such a construction would be clearly absurd, and in no way reconcileable with the manifest object of the proviso. The words, however, will clearly include all frauds or false statements, made in order to obtain the policy, whether in matters material or not: a consistent construction will thus be given to the whole. The proviso, in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared: but it goes further. In the anxiety of the Company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant; and lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial,

and leaves no room for dispute, whether the particular matter to which it related was material or not (which, in the case of a dispute, a jury would have to decide), leaving the Company to determine entirely for itself what matters it deems material, and what not. This seems to us to be the obvious ordinary sense of the words used, and there is no reason from the context to give any other than the ordinary sense to them, though they are to be construed as the words of the assurers, and most strongly against them if there be any ambiguity in them. There is no ambiguity in them in this respect. A doubt possibly may exist whether the word "false" is to be understood in the sense of false in point of fact, or morally false, though I believe most of us think that it is not to be limited to moral falsehood; but there seems to us to be no doubt, that if the statements are false, in whatever sense we understand that word, if they are used in effecting the insurance, this proviso operates. There then appear to us to be only two questions for the jury on this part of the policy:—Were the statements false? Were they made in obtaining or effecting the policy? Whether they are material or not, is not a necessary part of the inquiry. It has seemed to two eminent members of the Irish Bench, Mr. Justice Moore and the then Lord Chief Justice Blackburne, that the materiality of the question was involved in the inquiry, whether it was used by the assured to induce the Company to effect the policy. We do not agree in that reason. It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial, they would not be likely to effect it; but the materiality is not a necessary condition to bring them within the scope of the proviso, if it be shown that the statements were made in obtaining the policy, and for the purpose of effecting it; and here the terms of the particulars and the subjoined declaration preclude all doubt upon that question; for the truth of the answer is, in the strongest terms, made essential to the validity of the policy. We therefore answer your Lordships' first question in the negative, notwithstanding the ability shown by the Judges who have expressed

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

1853.  
*H. of Lords.*  
 ANDERSON  
 v.  
 FITZGERALD.

their opinion, that the materiality of the answers was a necessary part of the proof.

With respect to the second question proposed by your Lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. The bill of exceptions should have stated what directions the Judge gave, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. This was determined in the case of *M'Alpine v. Mangnall in error* (a). If it had been stated that the learned Judge told the jury it was necessary on those issues to prove the materiality of the answer, the exception would have been well founded. So it would, if the ground of his refusal to put the question in that form had been that all the allegations in the plea should have been proved, and that there was no evidence to that effect; because the plea being, in our opinion, good, as the materiality was not essential, the proof of a part, which, if pleaded and proved, would have barred the action, was sufficient. It would have been otherwise if the plea had been bad, when every part must have been proved, in order to sustain it, and obtain a verdict upon it.

July 14. The House now delivered judgment.

The LORD CHANCELLOR, after stating the case, proceeded as follows:—

My Lords, the important question is, whether the learned Judge was right in having directed the jury, that although the statements of the assured, as to none of his relations having died of pulmonary complaints, and as to his life never having been previously insured or rejected, were false statements made to the Company “in and about effecting the insurance,” they must find their verdict for the plaintiff, unless they were satisfied that those were material statements.

My Lords, although the learned Chief Justice (Blackburne) came to a conclusion different from that at which the learned

(a) 3 C. B. 516.

Judges advising your Lordships have arrived, in which I concur, and in which I am about to propose to your Lordships to concur, yet I think he very distinctly states that which is to be collected from the opinions of the other learned Judges, but which is more shortly and tersely stated in the judgment of Blackburne, C. J., than by any other of the learned Judges; and it is to that, therefore, that I will call your Lordships' attention. The Chief Justice says:—"The plaintiff in error contends that it is sufficient to ascertain simply, in the terms of the policy, that the false statement was made in or about obtaining the policy; and that, when this is done, the words of the condition are so comprehensive and stringent, that the question is solved, and the policy avoided, whether the statement was material or immaterial; in other words, that we are to read the clause as if it had contained these very words. I admit, if this be the meaning of the words—if this be so clearly expressed as not to admit of any other rational construction, we must give them the operation contended for. But is this so? It is obvious, that, to maintain a defence founded upon this provision of the policy, proof must be made, first, of the false statement of some matter or fact; and, secondly, that it occurred on the occasion of effecting the policy. The Judge and jury must inquire into both, and decide both." Up to this point I entirely concur with the learned Chief Justice. He puts the case very distinctly and clearly—"What could answer this inquiry, or be said, in any propriety of language, to come within such terms, but a mis-statement, used by the assured to induce the Company to contract? and how could it have done so if it were utterly immaterial?" Now, there, my Lords, I differ from the learned Chief Justice. The Company stipulate this—"You shall contract with us that you warrant certain things to be correct. Further than that, if you make to us any untrue statement in and about effecting the policy, that shall avoid the policy." And then the Company say—"We will not contract with you till you answer these two questions as the basis of the contract—'Have any of your relations died of pulmonary complaints? Have you been refused to be insured in any other

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

"office?" If you do not answer those two questions accurately, "the policy shall be void." That is the interpretation, which appears to me irresistible, when you take the policy and the particulars which were required to be subscribed together. The requirement is extremely reasonable, and the reason of making such a stipulation is obvious, and is explained by this very case. Whether or not certain statements are or are not material, where parties are entering into a contract of life insurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties who are entering into that contract should say for themselves whether they think any thing material or not; and if they choose to do so, and to stipulate that unless the assured answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so. Now, it appears to me, my Lords, that that is precisely what the Company have done here. They have said—"The basis of our contract shall be your answering truly these two questions." There were a great many others; but putting those aside, they say—"The basis of the contract between us shall be, that you shall answer truly these two questions; and if you do not answer them truly, the policy shall be void." But then, when the trial comes, as to whether the plaintiff has made out his right under that policy, the question is, whether the direction to the jury ought not to have been—"You are to ascertain whether what was then stated was untrue was false." If it was false, there is no question as to whether it was material or not, the parties having stipulated, that if it be false, the policy shall be void. Therefore, the question for the jury to decide was simply whether it was false or not. In that narrow compass the whole case lies. The learned Judge proceeded upon this well-known law—that there is a great distinction between that which amounts to what is called a warranty, and that which is merely a representation, inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says—"I warrant such and such a thing, which is here stated, and that is a part of the contract," then whether they are material or not is quite unimportant. The party must adhere

to his warranty, whether material or immaterial; but if the party makes no warranty at all, but simply makes a certain statement, if that statement be made *bonâ fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bonâ fide* or not, if it is not material, the untruth is quite unimportant. If the man, on entering into the policy, had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, it would be quite immaterial. If there be no fraud in the representation of that sort, it is perfectly clear that it forms no part of the contract. Even if it be material in such a case, if there be no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover. There are several cases which are collected together in 1 *Douglas*, in which this principle is well illustrated. But, my Lords, it appears to me that that principle has no application to a case where it is part of the contract, as it is here, that if a particular statement be untrue, then the contract shall be at an end. That distinction appears to me to have been overlooked by the learned Judges, and that oversight has been the ground of that which I must consider to be the erroneous conclusion at which they arrived. My Lords, it is within this narrow compass the case lies. We have had the assistance of eleven of the learned Judges of this country. They all took the same view of this case, and were of opinion that the learned Judges in Ireland committed an error in supposing that this doctrine of representation, as distinguished from a warranty, was applicable to the present case, in which the representation is itself embodied in the contract. They thought the conclusion at which the learned Judges in Ireland arrived was erroneous. My Lords, in that view of the case I entirely concur. Therefore, I shall think it my duty to move your Lordships that judgment be given for the plaintiff in error.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

LORD BROUGHAM.

My Lords, I entirely agree with my noble and learned friend, that this case really lies in a very narrow compass. It depends entirely upon the construction which we are to put upon these

1853.  
*H. of Lords.*  
 ANDERSON  
 v.  
 FITZGERALD.

words in the policy, "or any false statement made to them (the insurers) in or about the obtaining or effecting of this insurance." Now, first, there is the warranty; then there is, previously to the clause in question, "or if any circumstance material to this "insurance shall not have been truly stated, or shall have been "misrepresented or concealed, or shall not have been fully and "fairly disclosed or communicated to the said Company, or if any "fraud shall have been practised upon the said Company;" and then comes this larger, and as it were more sweeping clause, "or any false statement made to them;" as if it were, or any false statement whatever, "made to them in or about the obtaining or effecting of this insurance." Now, at first I had some doubt, as the learned Judges appear to have had, with respect to the word "false," whether it implies merely untrue, or morally false—untrue, whether within the knowledge of the party making it or not; or morally false, that is, untrue within his knowledge of its being untrue. At first I certainly had an impression on my mind that it was to be taken as implying *morally false*, rather than as untrue merely; and that impression was grounded upon what immediately precedes, for "true" is used in a former part of the document, and then "fraud" is used in the immediately preceding clause. Therefore, I had the impression at first, that "false" there meant morally false, as contradistinguished from merely untrue. I have since come to the opinion which my noble friend and the learned Judges advising the House have come to, that it does not mean morally false, but simply untrue. But be that as it may, it is quite immaterial; for whether we take the word as untrue absolutely, or untrue within the knowledge of the party making the statement, in either case it appears to me, as it has done to the learned Judges, perfectly clear, that the two questions to put to the jury were, first, was there an untrue statement made, whether with or without the knowledge of the party making it, that it was untrue or not? secondly, was it made in or about the obtaining or effecting this insurance? According to my opinion, agreeing entirely with that of my noble and learned friend and the learned Judges, those were the fit and proper questions, and the only questions, to be put by

the learned Judge to the jury. And I think further, that it would have been a matter of exception, and would have made the direction of the learned Judge to the jury liable to exception, if he had directed them, as is contended by the defendant in error, to consider the materiality of the statements in question. I therefore am of opinion with my noble and learned friend, that in this case we ought to give judgment for the plaintiff in error.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

LORD ST. LEONARDS.

My Lords, I believe that a more important case than the present has not come before your Lordships during this session; because, although the point turns simply upon the proper construction of the instrument, yet it leads to such important consequences with regard to insurances for life, which are so common in this country, and upon which people entirely depend as their security for a provision for their families, that it becomes exceedingly important to consider maturely what is the true construction of an instrument of this sort. It is of course prepared by the Company; and if, therefore, there be any ambiguity in it, it must be taken, according to law, more strongly against the person who prepared it. At the same time your Lordships must take care to guard Companies of this nature against any fraud, and to give validity to any part of the contract which has that object. That has been the practice for many years past. The Courts of Law, observing how very often Companies of this nature have been subjected to frauds, have advised those Companies to protect themselves, by a sufficient provision against the commission of fraud; and that has led to such stringent provisions as those which we find in this case—provisions which I am bound to say, unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance of their lives, upon the payment out of their income of, perhaps, a very considerable portion of it, when, in point of fact, from the very commencement, that policy was not worth the paper upon which it was written; and, as in the present case, the Companies take care to go beyond the law, that is, the law has itself thrown a shield of protection



1853.  
*H. of Lords.*  
 ANDERSON  
 v.  
 FITZGERALD.

around them; and if a statement, which is not a warranty, but a representation, be made contrary to fact, a material statement, that will by law, without any provision to that effect in the contract, avoid the policy. But then, if that statement was not untrue to the knowledge of the party who made the representation (the assured), he is entitled to recover the sums which he has paid. So that, although provision for the family is not obtained, yet there is no actual damage done to the fortune of the man. He is disappointed in his object, but the money which he has accumulated and paid for the insurance is repaid to the family. This Company has taken care that no such consequence shall ensue; and that, if any statement within their contract has not been truly represented, the man's family shall not only lose the benefit of the policy, but shall not be able to recover a single shilling of the premiums paid, however numerous they may have been.

Now, my Lords, this is rather a singular case. This Company started, in dealing with Mr. Fitzgerald, as all such Companies do. They tendered to him certain particulars in writing or printed, which they required him to answer, and to sign a declaration at the end of them. Certain questions were asked, most of them being material—the questions being twenty-seven in number; of those questions, which the man answered, whether truly or not, the Company, when they came to frame their policy, chose to select some fourteen, and to make every one of those questions—that is to say, fourteen out of twenty-seven, the express subject of a warranty; and they even carry it so far, as that, as regards the material questions, they leave out a particular portion from his answer. Question 12, in particular, stands thus:—"Is the party afflicted with an habitual cough, or any disease of the lungs, or any disease or disorder tending to the shortening of life?" That draws the man's attention to those particular diseases which are enumerated. In the warranty they make him warrant that he is not afflicted with an habitual cough, and leave out in the warranty the words, "or any disease of the lungs," and then they add the other general words, which no doubt are sufficient, "or any disease or disorder tending to the shortening of life." But in the warranty they

do not call his attention to the importance of the question whether he had any disease of the lungs. I only give that as an example. Now, looking to the questions which they have omitted in their warranty, we find they have omitted those two very important questions, upon which this case has ultimately turned—I cannot conceive two more material questions. One is, “Have any of your family died of consumption?” He said, “No.” Another is, “Has your life been refused to be insured by any other Company?” He answered in the negative. We are not now dealing with the truth or falsehood of the representations; this House has to deal with the abstract question of the construction of the policy; but I am putting it just to try the case. Supposing those questions to have been untruly answered, you would look naturally to the policy to see whether they were there; but the policy has excluded them. Now, the policy takes this shape: it states as many of the questions as the Company has chosen to take out of the particulars, and it states these as so many warranties; it then proceeds upon that warranty to grant the policy, going on in the common form assuring the money. Then comes this proviso, upon which the policy is granted—that in case he should do certain things, or go abroad, or enter the army or the navy, and so on, the policy shall be void. That is all quite right. Then come these important words, making void the policy—“or if any thing so warranted should not be true.” Now, there the attention of the assured is drawn at once to the warranty. He reads the terms of the warranty, and he is told, that if any thing that he states is not true, the policy is to be void. The word “true” there is used, of course, in a general sense; and whether the man knew it to be false or not, is utterly immaterial. Whether the circumstances warranted were material or not is entirely out of the question. It is simply sufficient, and ought to be sufficient, to avoid the policy, that any one thing warranted is not true; and therefore the word “untrue” there is used in its general sense of an untruth in the abstract. Then comes this, I may say, remarkable clause in reference to this contract. Your Lordships will observe, that whenever they begin a new limb of a sentence they begin it with a conjunction. The

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

first is this, which I believe I have already read:—"or if any thing so warranted should not be true." The next is—"or if "any circumstance material to the insurance should not have been "truly stated, or should have been misrepresented or concealed, or "should not have been fully and fairly disclosed and communicated "to the said Company." That is all one limb of the sentence, and that is all governed by the same words, the first words—"or if any material circumstance." So that all the misrepresentations and all the mis-statements which are there guarded against are with reference to some circumstance material to the insurance—"or if any circumstance material to that insurance should not have been" so and so. Now, so far it is perfectly correct, only it would have been much better if they had inserted those other things which they meant to consider material—the questions they had asked, and which had been answered; it would have led to a better understanding of the contract. But still the second limb of this sentence is right enough. The first is, if any portion of that warranty is untrue; the second, if any material circumstance has been untruly stated. If it is material, then its untruth will avoid the contract, although the party did not know it to be untrue. So far, I entirely go along with the contract.

Then come those words upon which so much has been turned, and which have led to so much division of opinion; and I must take the liberty of saying, that that very difference of opinion which has existed between such very learned persons upon such an important case as this, of itself shows the improper manner, in my judgment, in which this policy has been framed. A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which the party assured can be caught on the one hand, or by which the Company can be cheated on the other, shall be found upon the face of it, and nothing should be wanting in it the absence of which may lead to such results. When you consider the persons with whom such contracts as this are entered into—men in lowly and humble conditions of life, who can but ill understand such contracts, they ought not to be framed in a manner which shall

so perplex the judgments of the first Judges of the land as to lead to a serious difference of opinion between so great a number of learned persons as probably has ever been exhibited before your Lordships' House. Now, the words which have led to this great difference of opinion are these:—"or if." There begins the last limb of the sentence: it is all governed by the words "or if"—"or if any fraud shall have been practised upon the Company, or any false statement:" all governed by that first "if"—"or if any fraud shall have been practised upon the Company, or any false statement made to them in or about the obtaining or effecting of this insurance, this policy shall be void, and the premiums shall be forfeited." Now, what does this mean? Nothing can be more simple than the meaning of the first words—"or if any fraud." The provision against untrue statements and other material matters, before made, might be personation, for example. A great many descriptions of fraud may be in action. There might be many circumstances concurring to a fraud that could not be described, because fraud is a very general term; and it is impossible, therefore, to particularise beforehand what is meant by fraud. But you know very well what fraud is when it comes before you for judgment. Therefore, if there should be fraud, this policy very properly strikes at it. Now, the difficulty in which the Judges in Ireland involved themselves was this—they were endeavouring to import the word "material," which is found in the second branch of the sentence, into this branch. Of course, you could not speak of any thing so absurd as a "material fraud." "If any fraud" stands quite right. If any fraud has been committed, the policy is to be void. Then what is the meaning, in conjunction with those words, of what follows:—"or if any false statement be made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void?" Surely, my Lords, there, "false statement" must mean something which is connected with that which occurs in the other branch of this limb of the sentence—namely, "fraud." I have provided against any untrue statement generally contained in the warranty. I have provided against any material mis-statement generally. Then I

1853.  
H. of Lords.  
ANDERSON  
v.  
FITZGERALD.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

come to "fraud;" and fraud may be committed in action without any actual mis-statement; and, therefore, I connect with that, "false statement." Now, when I find that the contract uses two words which may have the same meaning, but which are open to different senses, to express the same thing, I must be very well satisfied, before I apply the same construction to those two words, that such was the intention; for if a proper word is used, which admits of a different sense, although it may admit of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which the first word was used, or else why not repeat the first word? Now, in what sense is the word "true" employed in the first part? "True," there, is used in the general sense; it signifies, not whether it is logically true or not; the question is, whether it be true. If it be not true, the consequences follow under this contract. But when I use the word "false" in a sense connected with fraud, what do I mean? I mean not only that which is untrue, but I mean that which is malicious, wilful—which is criminal, which is false in an odious sense, and to the man's knowledge; and therefore the construction which, after a great deal of consideration, I should put upon this part of the clause, certainly is, that it refers to a wilful fraud—a wilful mis-statement; and that the word "false" there is used in contradistinction to the word "untrue" in the former part of the sentence, and means a wilful mis-statement; and then connecting that with the subsequent words, a wilful mis-statement, as it should be read, "in or about the effecting of the insurance," I think all the mischief will be taken out of this policy; because I think there is no jury who, having such a case before them, would, where a mere impertinent question had been asked of a man, and untruly answered, though it might be held to be about the insurance, come to the conclusion that that man had committed wilful falsehood upon such a subject, when the statement had not and could not have any material bearing upon the insurance; and if the untruth must be wilful, I think that any honest man would be safe, even under this contract, in such a construction. The question, then,

would be, was this a wilful falsehood in or about effecting the insurance? Supposing it were some indifferent question which they chose to put to him, and which he had answered, but yet had not answered truly; if the jury were satisfied that it was a mere impertinent, irrelevant question, their verdict would be in his favour. For observe, if it be an impertinent or irrelevant question, how likely it is that the assured will have his prudence and his caution lulled to sleep, and will not be so alive to the duty of answering truly as he would be, meaning to act honestly, in regard to matters which he could not help feeling were essentially necessary to be answered, in order to enable the Company to form their judgment upon the subject.

I think that your Lordships, and every Court of Justice, should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure that if policies of this nature are to be entered into, and such doubts are to be raised as have been raised in this case, that very important branch of insurance—life insurance, will become very distasteful to people, and that no prudent man will effect a policy of insurance with any Company without having an attorney at his elbow to tell him what the true construction of the document is. And, indeed, in this case it has been necessary to consult all the Judges in Ireland; and they having decided in one way upon the language of this policy, all the Judges of England have come to a different opinion.

My Lords, notwithstanding that I have thought it my duty, and of great importance, to draw your Lordships' attention to the true construction of this policy, I do not disagree with my noble and learned friend in the motion which he has made, because I think the jury were not properly directed as to the materiality of the untrue statements. I think that, in reference to these two questions—for example, whether any of his relations had died of pulmonary complaints, and whether his life had been refused by any other Company—the learned Judge ought not to have told the jury that they ought to find for the plaintiff in error, unless they were of opi-

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

nion that those statements were both false and material. I think that that was a wrong direction, and therefore I agree with the motion of my noble and learned friend. But I think it very important to impress upon Companies that they ought not to issue policies in this shape; and I think that this Company would do well if they were to place the word "wilful" before the words "false statement," in that latter branch of the clause. So, if it is their intention to exclude materiality, I think it would be but honest and fair to state so upon the face of their policy, so that persons who are really not competent to form a judgment upon such a question may at once, upon the face of the policy, see what risks they run; for remember that the proviso inflicts the loss upon the family not only of the sum assured, but of all the sums, which may have been a great portion of the savings of a man's life, which have been paid for the policy itself. After all, everybody feels this difficulty. The Company are entitled, and they are bound, to guard themselves against fraud; and Courts have always shown the utmost anxiety to protect them against fraud, and always will do so. We are not entitled to look at the facts of this case, and therefore I am not using the facts for the purposes of the judgment which I am recommending your Lordships to give; but the facts of this case were very likely to mislead any man in his judgment, because, in point of fact, the jury went wrong in this case, and the proper application to the Court would have been to set aside the verdict, and not to have taken the exception to the Judge's charge. Nothing upon earth could have been clearer than that the two questions were material. The jury were perverse, and went wrong in bringing in a verdict contrary to the evidence, as to the materiality of the questions. What could have been more material than that question, "Has your life been refused by other offices?"—because, if it had been answered truly, they would then have asked him what offices. He must have stated what offices, and then they would have had an opportunity of inquiring of those offices what were the grounds upon which they had refused him. Nothing, therefore, could have been more material. It seems to have been, so far as we can judge from the evidence, a very proper case for the Company to resist. There-

fore, I am not finding fault with the conduct of the Company in this case, but I am drawing your Lordships' attention, which I thought it very material to do, to the terms of the policy. I think the Company are right enough in the course they took in resisting the claim, but I think they are not right in the frame of their policy. I entirely agree with the motion of my noble and learned friend.

1853.  
*H. of Lords.*  
ANDERSON  
v.  
FITZGERALD.

Judgments of the Courts of Exchequer and Exchequer Chamber in Ireland reversed, and a *venire facias de novo* granted.



E. T. 1853.  
*Crim. Appeal.*

THE QUEEN v. REDMOND.\*

Jan. 20,  
 April 14.

(Court of Criminal Appeal.)

An indictment charged the prisoners with stealing 40lbs. weight of mutton, the property of some persons unknown; the evidence was, that one of the prisoners, in answer to the constable, if he had any mutton in his house, replied, "that his house was seldom without mutton, to his grief;" that mutton was found in a box in the room where the prisoner was, and in the adjoining cow-house two other of the prisoners were found lying behind one of the cows; and that in examining the wall of the cow-house, a cavity was discovered, where 30lbs. of mutton were found.

Evidence was given that sheep-stealing was common in the neighbourhood.

*Held*, that this evidence was sufficient to warrant the Judge in sending the case to the jury, that the mutton so found had been stolen by the prisoners. *Held*, also, that though there was no evidence of identification of the mutton, yet the indictment describing it as belonging to persons unknown was sufficient.—[Pigot, C. B., *disentente*.]

THIS was a case reserved for the opinion of this Court by the Assistant-Barrister for the county of Wicklow.

The case stated that at the Quarter Sessions held at Baltinglass, in the county of Wicklow, on the 4th of January 1853, the following indictment had been found by the jury:—

"The jurors for our Lady the Queen, upon their oath, present  
 "that Marks Redmond and Daniel Smith, both late of Lockstown  
 "in the county of Wicklow, labourers, and Mary Redmond the  
 "elder, Elizabeth Redmond and Mary Redmond the younger, all  
 "late of the same place, dealers, on the 30th day of November,  
 "in the 16th year of the Queen, with force and arms, at Locks-  
 "town, in the county aforesaid, 40lbs. of mutton, of the value of  
 "twenty shillings, of the goods and chattels of some person or  
 "persons to the jurors aforesaid unknown, then and there being  
 "found, feloniously did steal, take and carry away, against the  
 "peace," &c.

It was proved on the trial, that at two o'clock in the morning of the 30th November (the weather being clear and frosty), some of the police went to the house of the prisoner Marks Redmond. That they found him in bed, and the prisoner Elizabeth lying on straw, with her clothes on. That the police asked for the prisoner Daniel Smith, when Marks Redmond replied, "he was not at home, for he

\* *Coram* LEFROY, C. J., PIGOT, C. B., CHAMPTON, J., BALL, J. and GREENE, B.

had sent him to the mill the evening before, from which he had not yet returned." That the police then asked Marks Redmond if he had any mutton in his house, to which he replied that "his house was *seldom without mutton*, to his grief." That the police found some mutton in a *box* in the room, and other pieces in a pot, and that on going into the cow-house (which was at the end of and adjoined the dwelling-house of Marks Redmond); they found the other two prisoners Daniel Smith and Mary Redmond concealed in a corner, *lying behind one of the cows*, Mary being partly stripped, lying on straw; no bed-clothes were to be seen. That on examining the wall of the cow-house (which was also the end wall of the dwelling-house), the police perceived a projecting stone, which they pulled out of the wall, and saw within a large space hollowed out of the wall, which was gutted for the purpose of concealment, and that in this cavity they found about 30lbs. of mutton cut up in several pieces, not quite cold, which they considered from its appearance must have been recently killed.

E. T. 1853.  
*Crim. Appeal.*  
THE QUEEN  
v.  
REDMOND.

Upon this evidence having been given, the Crown intimated that the case for the prosecution had closed; the Counsel for the prisoners then objected that there was no proof of the *loss* of mutton (meaning, of course, that the fact of stealing any had not been proved).

The Crown then proposed to call, and the Barrister allowed them to call, a witness named Stephen Nugent, who lived near the prisoners, and who swore that, some time before, one of his mother's sheep had been stolen; and one of the police was also called, who swore that a case of sheep-stealing had been reported at the police station three nights before, and that the sheep belonged to one James Miley.

It was objected by the Counsel for the prisoners that this evidence of the police constable was inadmissible, as being merely hearsay.

No witnesses were called by the prisoners, and their Counsel then called on the Barrister to direct the jury to acquit them, on two grounds, first, that the evidence of stealing was that of two

E. T. 1853. sheep belonging to persons whose names were known; secondly,  
*Crim. Appeal.* that there was *no* evidence of the loss or stealing of *mutton*  
THE QUEEN at all.  
v.

REDMOND. The Assistant-Barrister was of opinion that there *was* evidence to go to the jury that the mutton so found had been stolen by the prisoners, and that as there was no evidence as to whom that *identical* mutton belonged, the indictment, which described the property as belonging to persons unknown, was sustained, and declined to give the direction to the jury sought for by the prisoners' Counsel.

He considered the following facts sufficient to show the mutton had been stolen by the prisoners: the denial by Marks Redmond that Daniel Smith was at home, who was nevertheless found hiding, together with Mary Redmond, in the adjoining cow-house, in the manner described above; the reply of Marks Redmond to the police constable, that "his house was seldom without mutton, to his grief;" that some mutton was found concealed in a *box*; and, above all, the fact of the concealed repository in the hollowed wall, in which so large a quantity of mutton recently killed was found. And taking all these circumstances together (independently of the evidence as to the actual loss of sheep, and assuming some of it to have been inadmissible), he was of opinion that there was evidence to go to the jury that mutton, the property of a person or persons unknown, had been stolen by the prisoners: and accordingly he left the case to the jury, telling them at the same time, with reference to the second point made by the prisoners' Counsel, that they ought not to convict the prisoners, unless they believed that at the time of the commission of the alleged felony, the property charged to be stolen was *then* actually *mutton*.

The jury found *all* the prisoners guilty, but the Barrister respited judgment, and reserved the case, although he thought the verdict sustainable, inasmuch as, in his judgment, there was sufficient evidence to raise a reasonable presumption that the taking was felonious; and that as the case had been made out on unquestionably legal evidence, so as to leave no doubt of the guilt of the prisoners

in the mind of any reasonable man, the fact of *inadmissible* evidence having reached the jury (assuming such to have taken place) should not invalidate that conviction. But, considering all the circumstances of this case, and the frequent occurrence of similar cases in the county of Wicklow, he conceived it to be his duty to ask for the judgment of this Court, whether there was sufficient evidence in this case to sustain the verdict of the jury; and directed that the prisoners should stand out, on giving bail to appear and receive sentence.

E. T. 1853.  
*Crim. Appeal.*  
THE QUEEN  
v.  
REMDOND.

The case was argued in Hilary Term, by *J. A. Curran*, for the prisoners, and *Corballis* on the part of the Crown.

The following authorities were relied on: 2 *East, P. C.*, p. 651; 2 *Rus. Cr. L.* p. 97; *Rex v. Ball (a)*; *Rex v. Treble (b)*; 1 *Hale, P. C.*, pp. 508, 509; 2 *Hale, P. C.*, p. 289.

*Cur. ad. vult.*

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GREENE, B.

In this case it appears to me, having regard to the nature of the indictment, that there was evidence to sustain the charge that the prisoners had stolen mutton, the property of some person unknown. The case would have been different, if the prisoners had been indicted for a felony of goods alleged to be the property of a prosecutor; and the prosecution failing for want of proof of ownership, or for other reasons, there the prisoner must necessarily be acquitted.

April 14.

It was argued that this indictment could be sustained only by direct evidence of the prisoners having committed the larceny; but that argument admits that the larceny may be committed, though the ownership of the property cannot be proved. The question then would be, was there evidence to go to the jury of the commission of the larceny? It would be impossible to lay a charge of stealing property belonging to some person unknown, unless there was evidence of something like an admission of the charge; and may not the jury draw the conclusion as to how the property came to the hands of the prisoner, from his admissions? His conduct may as

(a) R. & R. Cr. Cas., 132.

(b) Ibid, 164.

E. T. 1853. nearly amount to an admission as an express declaration of guilt.  
*Crim. Appeal.* There is here the declaration and conduct of the accused persons,  
 THE QUEEN from which the jury might fairly draw the conclusion that the  
 v. property was feloniously obtained. There is the declaration of  
 REDMOND. Marks Redmond, the circumstance of concealment, and other mat-  
 ters stated, from all which the jury were at liberty to draw an  
 inference, whether the goods were feloniously taken by the prisoners  
 or not. It cannot, therefore, be said there was no evidence for  
 the jury; nor that the Assistant-Barrister was bound to tell the  
 jury there was no evidence, and thus withdraw the case from their  
 consideration.

BALL, J.

This was an indictment for larceny of goods, the property of a  
 person unknown. In my judgment, there was sufficient evidence  
 in the case to warrant the jury in drawing the inference—first, that  
 the mutton had been stolen, and secondly, that the prisoners were  
 the persons who had stolen it.

There are certain facts, which afford evidence that some one had  
 been robbed, and that the prisoners knew of the robbery; and fur-  
 ther evidence of an admission that the property had been stolen, at  
 least evidence to go to the jury of such an admission. The admis-  
 sion was not made in terms, but by expressions amounting in effect  
 to an admission. The expression of Marks Redmond, "that his  
 house was seldom without mutton, to his grief," may be susceptible  
 of meaning that the mutton was stolen. Again, on his being asked  
 for the prisoner Daniel Smith, he replied "that he was not at home,  
 "for he had sent him to the mill the evening before, and he had not  
 "returned." It is quite possible that statement may have been true;  
 but it was a circumstance for the jury. Again, see what are the  
 facts. The police found some mutton in a box, in the room where  
 Marks Redmond was; and other pieces are found convenient, and in  
 the cow-house the prisoners, Daniel Smith and Mary Redmond, are  
 found lying concealed behind one of the cows, where also are found  
 30lbs. of mutton in a cavity in the wall. Were not the jury to say  
 whether there was any thing in these circumstances, taken in con-

nexion with other matters, that would lead to the conclusion of  
 guilt? According to my opinion, the facts were properly left to  
 the jury, with a double view—first, were they satisfied the mutton  
 had been stolen? and secondly, if so, were the prisoners the persons  
 who had stolen it? But we are pressed with the position, from  
 Lord *Hale*, that where an indictment charges a party with stealing,  
 the Judge should not send the case to the jury, if there was no  
 other evidence save the fact of the stolen property being found in  
 the possession of the accused, and unaccounted for. Certainly, a  
 Judge should require evidence in some shape that a felony had  
 been committed, of the description charged; here, we have a de-  
 claration and other facts, raising the strongest suspicion, in the  
 combination of all which facts it was for the jury to say, had  
 the prisoners committed the felony? In the case mentioned by  
 Lord *Hale*, the not accounting for the property may not have  
 been inconsistent with the innocence of the party charged. But  
 the present case differs; the circumstances here were amply suf-  
 ficient to warrant the Judge in sending the case to the jury. I  
 think, therefore, this conviction was right.

E. T. 1853.  
*Crim. Appeal.*  
 THE QUEEN  
 v.  
 REDMOND.

CRAMPTON, J.

There is no maxim better established than that a person can-  
 not be found guilty, unless it be shown that an offence has been  
 actually committed; it is also equally clear that the same evi-  
 dence which establishes that the offence was committed may also  
 show by whom it was committed; and the facts necessary to  
 be established, to sustain the conviction, may be proved by cir-  
 cumstantial evidence. We are not here to criticise the conduct  
 of the jury; but we are to answer the question which the  
 Assistant-Barrister has reserved for us, namely, was there evi-  
 dence to go to the jury, that the mutton found in the possession  
 of the prisoners was stolen? What is the evidence? First, it  
 is plain, from the finding of the jury, that the mutton was not  
 the property of the prisoners; the declaration of the prisoner  
 Marks Redmond is quite conclusive on that head. Whether his  
 reply could be understood as a claim of property, was for the

E. T. 1858.  
*Crim. Appeal.*

THE QUEEN

v.

REDMOND.

jury; no man could "fear" having mutton in his house as food. His reply, then, must suggest an admission that the mutton so found was not his property, and therefore not his. It neatly come by; such an observation then, is evidence, not of property, but of larceny. We have the mutton found in the house of the prisoners, under circumstances which would lead inevitably to the conclusion that it was stolen. There is nothing to prevent a man being indicted for the larceny of property of a person unknown. The very language of an indictment implies an impossibility of proving the taking of the property from a particular person; so that any proof to go to the jury that there had been a dishonest taking, and that the prisoners were connected with it, would be sufficient evidence of guilt. Certainly, an admission in words is sufficient to establish larceny. Suppose, when the question was put to Marks Redmond, he had said, "I admit I took the mutton," that taking might have been innocent; but that was an inference for the jury. Now, it is conceded that admission would have been sufficient evidence of guilt; but surely the same thing may be proved by circumstances, as easily as by actual admission. The circumstances here are very strong against the prisoners. First, the principal makes a false statement, and that is ever looked upon as a matter of suspicion; there is then found a place made for the purpose of concealment, and where some of the mutton was actually discovered; and there is the further circumstance, equally strong, that two of the prisoners were found in the cow-house, concealing themselves. These are circumstances cogent to establish that the property found was not the property of the prisoners. I feel no difficulty in saying, the evidence was sufficient to sustain the indictment.



PIGOT, C. B.

In this case I have come to a conclusion different from the other members of the Court. I am of opinion there was not sufficient evidence to warrant the conviction.

It is a rule, in the application of evidence with regard to larceny,

that to entitle a prosecutor to put the person found in possession of property, on proof of the manner by which he came by the property, some evidence must be given of the *corpus delicti*, in addition to the proof of possession. It is, in truth, only the application of the general rule, the presumption of ownership attaching to the possession. The person in possession is *prima facie* presumed to be the owner, unless there be actual evidence to the contrary; and there is also the well-known presumption of innocence instead of guilt, so that the *corpus delicti* must be proved, before the accused person is called on to defend himself.

E. T. 1853.  
Crim. Appeal.  
THE QUEEN  
v.  
REDMOND.

It appears to me that, with regard to two of the prisoners, there is no evidence of guilt, except the fact of the goods being found under circumstances which might lead to the supposition they had concealed them. They said nothing; they did nothing. They were not present at the time the question was put to Marks Redmond. The *corpus delicti* requires there should be a taking, *animo furandi*, and also *in invitum*; hence, the taking of a waif, if there be no apparent owner, will not amount to a larceny of the waif.

In the case before us, there is nothing inconsistent with the notion of this property having been found; nothing inconsistent in the supposition that the sheep might have been found dead, and thus might have come into the possession of the accused; thereby the presumption of larceny would be excluded. In 2 *Hale*, p. 289, it is said, "In some cases, presumptive evidences go far to prove "a person guilty, though there be no express proof of the fact to "be committed by him; but then it must be very warily pressed, "for it is better five guilty persons should escape unpunished, than "one innocent person should die." And again, "I would never "convict any person for stealing the goods *cujusdam ignoti*, "merely because he would not give an account how he came by "them, unless there were due proof made that a felony was committed of these goods." A case in 8 *Mod.*, p. 449, is to the same effect. And again, in 2 *East, P. C.*, p. 651, it is laid down:—"In "prosecutions for stealing the goods of a person unknown, some



E. T. 1853. "proof must be given, sufficient to raise a reasonable presumption  
*Crim. Appeal.* "that the taking was felonious or *invito domino*; for it is not  
 THE QUEEN "enough that the prisoner is unable to give a good account how  
 v. "he came by the goods. This seems to be the true ground upon  
 REDMOND. "which persons indicted for stealing any goods, in themselves the  
 "subject of property, but whereof no owner can be found, are, in  
 "any instance (the fact of taking, &c., *lucri causa* being proved),  
 "entitled to an acquittal; for the true owner, by losing them,  
 "does not lose the property in them until seizure by some other  
 "person having a right to seize in such cases. And as the form  
 "of the indictment, laying them to be the property of a person  
 "unknown, is good, the only difficulty lies in proving that the  
 "taking was felonious, or *invito domino*." There is a very re-  
 cent case, which is an illustration of this doctrine—*The Queen v.*  
*Dredge (a)*. In that case, a boy was indicted for stealing a doll  
 and other toys. It was proved that the prosecutor kept a large  
 toy-shop; that the prisoner came into his shop, and after remain-  
 ing there for some time, suspicion was excited. He was searched,  
 and under his smock-frock were found concealed a doll, and other  
 such things. The prosecutor swore he believed they were his pro-  
 perty, and that the doll had been his, as he found upon it his private  
 marks; but he could not say that he had not sold it, and he had not  
 missed it, and could not miss it, from the nature of his stock. And  
 Erle, J., says, "It seems to me that you have failed to establish in  
 "this case the *corpus delicti*. It is true that the prosecutor swears  
 "that the doll was once his; but he cannot state that it was taken  
 "from him; and for aught that appears to the contrary, the prisoner  
 "may have come by it in an honest manner."

I understand the authorities to lay down the rule thus that the  
 circumstance of mere possession is not in itself sufficient to warrant  
 the Court in directing the jury to find the accused guilty of stealing  
 the property. The *dictum* of Lord Hale, which has been relied on,  
 is not intended to convey that the property must be traced to the  
 owner; it is enough to show that it is the property of some person,  
 and was taken feloniously.

(a) 1 Cox, C. C., 235.

Again, it is said we are only to deal with the verdict in reference to all the prisoners, and that if the charge be right as to any one, we cannot take into consideration the circumstances affecting the other prisoners. We are here, however, to consider the whole verdict, and we are to distinguish the evidence as it applies to each prisoner. The Assistant-Barrister has presented the case to us as connected with all the parties; but if this Court be satisfied the verdict is wrong with respect to any one of the prisoners, we are bound to consider the case in reference to each, because there is but one verdict. Here, the case is founded on the admission of Marks Redmond. All that he said, in the absence of the others, is to be excluded from the consideration of the jury. The result of the evidence, as regards two of the prisoners, is, that they were found in possession of meat concealed. This is the entire of the case as regards them; and is it to be inferred that the meat was stolen by them, because it was found in their possession, under these circumstances of concealment? Nothing was said by them—nothing was done by them; it is similar to the case of *The Queen v. Dredge*. In that case the ownership of the property in the goods was established at the time—here there was no proof of property in any person. There appears to me to have been in that case stronger evidence of the property having been stolen than in the present; because there it was found in the prisoner's possession in the shop of the owner.

I was at one time disposed to consider whether evidence of the fact of several felonies of sheep having been committed before in the neighbourhood should not be taken into consideration; but that is out of the case, because the Assistant-Barrister says there was sufficient evidence to warrant the jury in a finding, independent of it. The 28 G. 3, c. 37 (*Ir.*), enables a constable to search suspected houses for sheep, lambs, &c., stolen, or suspected to be stolen; and if he shall find any sheep, lambs, &c., so stolen, or suspected to be stolen, or any mutton, skin, or fleece of wool of any sheep, &c., in the possession, house, or out-house of any person so suspected of stealing same, or receiving same, being stolen, he may bring such person before a Justice of the Peace, and if such person

E. T. 1853.  
*Crim. Appeal.*  
**THE QUEEN**  
**v.**  
**REDMOND.**

E. T. 1853. shall not make proof to the satisfaction of the Justice, same to have  
Crim. Appeal been honestly come by, the party shall be liable to a penalty, and,  
 THE QUEEN on non-payment thereof, may be committed for the time therein  
 v. specified; and the 14 Vic., c. 192, contains somewhat similar  
 REDMOND. provisions.

Now, the state of facts presented by the Assistant-Barrister would establish a conviction under either of these Acts. Each statute creates a distinct offence; but if the evidence now before us would warrant a conviction for larceny, I cannot understand how it can be contended that the facts there defined would not warrant a similar conviction; if so, these enactments would be totally useless in a vast variety of cases. I do not say all the elements exist in the present case that ought to exist in a prosecution under these statutes; but it was the very difficulty intended to be met by this legislation: and that is some reason for holding that more evidence is necessary for establishing the *corpus delicti*, than the finding of something. If the rule be that in every instance the ownership shall be withdrawn from the jury, and that in every instance it will be sufficient to show the prisoner in possession, without proof of ownership, it is perfectly clear that it will be the introduction of a new rule and a new practice. A person may be found in possession of property, under circumstances it would be difficult to account for; that person may be able to show the articles were found, but cannot tell the person who found them—all that class of proof he is disabled from giving, by being the person charged. It appears to me, therefore, that the protection will be withdrawn which would have been the protection of the innocent, and an important innovation on the rule of evidence will be laid down: therefore, without going into the particular circumstances, I am of opinion there was not sufficient evidence to warrant this conviction, at least against two of the prisoners.

LEFROY, C. J.

In this case I confine myself strictly to the case before us, and the question referred to us; and by so doing, I am not obliged

to differ from the CHIEF BARON, or from the law laid down by Chief Justice Hale, as to larceny, though concurring with the other Members of the Court.

E. T. 1853.  
Crim. Appeal.  
THE QUEEN  
v.  
REDMOND.

The question simply is, was the Assistant-Barrister called on to direct the jury to acquit the prisoners on the evidence given? I do not think he would be justified in saying there was no evidence to go to the jury. The indictment is not for sheep-stealing, but charges the prisoners with having stolen property—namely mutton—the property of some person unknown. The statutes referred to by the CHIEF BARON were passed to suppress the offence of sheep-stealing; and there is in those statutes a special saving of proceedings, similar to the present, leaving them as they stood at Common Law.

The gist of an indictment in this form is, that the goods were the subject of larceny, being property; but in the case of waifs and animals *feræ naturæ*, no indictment is maintainable, not because no person is named as owner, but on the unsusceptibility of their being the property of any person; for every indictment supposes the thing to be in its nature property. There must be due proof—that is, there must be sufficient evidence to go to the jury that a felony was committed of the goods. There is no case to show that circumstantial evidence is not admissible to prove that the felony was committed by the prisoner himself—that the *corpus delicti* was his act. I cannot hold that it is necessary to establish that the *corpus delicti* was committed by any other person than the prisoner; neither can I find any case establishing that the circumstances under which the property was found—all that passed at the time and place of its discovery—the conversations, &c.,—that all that is not relevant and substantial evidence, or that there is any thing further required to bring the case home to the prisoner. If that be so, the evidence here was evidence of a kind to justify the Assistant-Barrister in the course he took. Circumstantial evidence is to be weighed with reference to what the party against whom it is applied has the means and opportunity of explaining: here, the prisoner, instead of justifying himself when charged, makes no

E. T. 1853. shall not make proof to the satisfaction of the Justice  
*Crim. Appeal.* been honestly come by, the party shall be liable  
 THE QUEEN on non-payment thereof, may be committed for  
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 was present, and he  
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 session? The strict rule in  
 the difficulty of identification—  
 ence, though there be no evidence  
 = difficulty is increased, for there is  
 identification, but the difficulty connected  
 In Assistant-Barrister was therefore right  
 as the jury; but we intimate no opinion as  
 as the finding of the jury.

E. T. 1853.  
Crim. Appeal.

June 8.

mitted to them  
the county of Cork,  
ed, the conviction of  
was a good conviction.  
s tried at the Middleton  
t, for the county Cork, East  
ry, alleged to have been com-  
a civil-bill process, tried at the  
Middleton, in the East Riding of the  
er 1852, before the Assistant-Barrister  
the traverser was sued as defendant, and  
ned as a witness in support of his own case.  
as as follows:—  
ang. } “The Jurors for our Lady the Queen,  
ddleton. } ‘upon their oath, do say and present,  
fore, to wit, at the General Sessions of the Peace,  
t, &c., on, &c., before Walter Berwick, Assistant-Barrister  
e said County and Riding, a certain civil-bill, wherein one  
an Ffolliott Giles was plaintiff, and one Edward Lawlor was  
efendant, came on to be tried in due form of law, and was then  
and there tried by the said Walter Berwick, Assistant-Barrister  
“for the said Cork county, and East Riding and division, upon  
“which said trial said Edward Lawlor, of, &c., then and there ap-  
“peared as witness, for and on behalf of himself; and the said

An indictment  
for perjury  
charged that a  
civil-bill came  
on to be tried  
in due form of  
law, and was  
tried by the  
Assistant-Bar-  
rister for the  
county, on  
which trial  
the prisoner  
(being defend-  
ant in the civil  
bill) appeared,  
and was then  
and there duly  
sworn before  
the Assistant-  
Barrister, he  
having suffi-  
cient and com-  
petent author-  
ity to adminis-  
ter said oath.

*Held*, that  
the indictment  
was sufficient;  
and that it was  
not necessary  
to aver that  
the civil-bill  
was for a cause  
of action  
within the ju-  
risdiction of  
the Civil-bill  
Court.

*Held also*,  
that the Court  
of Quarter  
Sessions had  
jurisdiction to  
try a case of  
perjury.

*Held also*, that the Barrister had jurisdiction to award the costs and expenses of  
such prosecution to the prosecutor.

\* *Coram* MONAHAN, C. J., PIGOT, C. B., PENNEFATHER, B., CRAMPTON,  
PERRIN, BALL, JACKSON, MOORE, J.J., and GREENE, B.

E. T. 1853. attempt at explanation in reference to this suspicious circumstance  
*Crim. Appeal.* of mutton being found concealed. A person is not to be convicted  
THE QUEEN on suspicion alone; but concealment is an important element—  
v.

REDMOND. the case may turn on it not only as proof of the theft, but as  
proof of his being receiver of the stolen property. The circum-  
stance of concealment attaches an inference of guilt, which would  
not otherwise arise; therefore, when it is said that possession  
of property is *prima facie* evidence of ownership, we do not,  
by our judgment, impugn that rule; but it is a different case,  
the possession of property under the circumstances detailed here.  
These circumstances repel the *prima facie* presumption, and  
qualify the inference that would arise from mere possession.  
It does appear to me our decision is distinguishable from the  
authorities referred to by the CHIEF BARON, particularly the last  
case, because there the owner of the property was present, and he  
could not say he had been defrauded of the possession unlawfully:  
what, then, was there to impugn the possession? The strict rule is  
that case was relaxed, because of the difficulty of identification—  
why not allow circumstantial evidence, though there be no evidence  
of the ownership? Here the difficulty is increased, for there is  
not only the difficulty of identification, but the difficulty connected  
with the ownership. The Assistant-Barrister was therefore right  
in leaving the case to the jury; but we intimate no opinion as  
to whether we concur in the finding of the jury.

E. T. 1853.  
*Crim. Appeal.*

THE QUEEN, at the prosecution of JOHN GILES,

v.

EDWARD LAWLOR.\*

June 8.

THIS case came before the Court, on a question submitted to them by the Assistant-Barrister of the East Riding of the county of Cork, namely, whether, under the circumstances stated, the conviction of the defendant Edward Lawlor, for perjury, was a good conviction.

The case stated that the prisoner was tried at the Middleton Quarter Sessions, holden in March last, for the county Cork, East Riding, on an indictment for perjury, alleged to have been committed by him on the hearing of a civil-bill process, tried at the Civil-bill Sessions, holden at Middleton, in the East Riding of the county of Cork, in November 1852, before the Assistant-Barrister for said Riding, in which the traverser was sued as defendant, and on which he was examined as a witness in support of his own case.

The indictment was as follows :—

<p>“Cork, East Riding.          “Division of Middleton.</p>	}	<p>“The Jurors for our Lady the Queen,          ‘upon their oath, do say and present,          “that heretofore, to wit, at the General Sessions of the Peace,          “holden at, &amp;c., on, &amp;c., before Walter Berwick, Assistant-Barrister          “for the said County and Riding, a certain civil-bill, wherein one          “John Ffolliott Giles was plaintiff, and one Edward Lawlor was          “defendant, came on to be tried in due form of law, and was then          “and there tried by the said Walter Berwick, Assistant-Barrister          “for the said Cork county, and East Riding and division, upon          “which said trial said Edward Lawlor, of, &amp;c., then and there ap-          “peared as witness, for and on behalf of himself; and the said</p>
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An indictment for perjury charged that a civil-bill came on to be tried in due form of law, and was tried by the Assistant-Barrister for the county, on which trial the prisoner (being defendant in the civil bill) appeared, and was then and there duly sworn before the Assistant-Barrister, he having sufficient and competent authority to administer said oath.

*Held*, that the indictment was sufficient; and that it was not necessary to aver that the civil-bill was for a cause of action within the jurisdiction of the Civil-bill Court.

*Held also*, that the Court of Quarter Sessions had jurisdiction to try a case of perjury.

*Held also*, that the Barrister had jurisdiction to award the costs and expenses of such prosecution to the prosecutor.

\* *Coram* MONAHAN, C. J., PIGOT, C. B., PENNEFATHER, B., CHAMPTON, PERRIN, BALL, JACKSON, MOORE, J.J., and GREENE, B.



E. T. 1853. *Crim. Appeal.* "Edward Lawlor, the defendant in the said civil-bill, was then and  
*THE QUEEN* "there duly sworn, and took his corporal oath upon the Holy Gos-  
*v.* "pels of God, before the said Walter Berwick, so being such As-  
*LAWLOR.* "sistant-Barrister for the said East Riding of said county; that the  
"evidence which he (the said Edward Lawlor) should give to the  
"Court, touching the matter then in question between the said par-  
"ties, should be the truth, the whole truth, and nothing but the  
"truth, he (the said Walter Berwick), Assistant-Barrister as afore-  
"said, having then and there sufficient and competent authority to  
"administer the said oath to the said Edward Lawlor in that be-  
"half. And the jurors aforesaid, upon their oath aforesaid, do  
"further present, that at and upon the trial of the said civil-bill  
"between the said parties, it then and there became and was a  
"material question whether the said Edward Lawlor got, between  
"the 1st day of December, in the year of our Lord 1850, and the  
"1st day of December 1851, from the plaintiff, John Ffolliott Giles,  
"twenty-five tierces or half-barrels of porter; and whether the said  
"Edward Lawlor got porter from the said John F. Giles, some-  
"times, half a barrel in a week—sometimes, in a fortnight, and  
"whether a greater interval than three weeks elapsed during said  
"year, during which the said Edward Lawlor got no porter from  
"the said John F. Giles. And the jurors aforesaid, upon their oath  
"aforesaid, do further say and present that the said Edward Lawlor,  
"being so sworn as aforesaid, not having the fear of God before  
"his eyes—not regarding the laws of this realm—but being moved  
"and seduced by the instigations of the Devil, and contriving and  
"intending to prevent the due course of law and justice, and un-  
"justly to aggrieve the said John F. Giles, the said plaintiff, then  
"and there, on the trial of the said civil-bill, upon his oath afore-  
"said, falsely, corruptly, knowingly, wilfully and maliciously, before  
"the said Walter Berwick, Assistant-Barrister for said Cork county  
"and East Riding aforesaid, did depose and swear, in substance and  
"to the effect following—that is to say, that he (the said Edward  
"Lawlor) got, between the 1st day of December, in the year of  
"our Lord 1850, and the 1st day of December 1851, from plaintiff,  
"John F. Giles, twenty-five half-tierces or half-barrels of porter;

"that he (the said Edward Lawlor) had no books of account, but  
 "recollected the quantity got; that during that period, he (the said  
 "Edward Lawlor) got from the said John F. Giles two half-tierces  
 "or half-barrels in one day, and on four or five occasions during  
 "the year, he (the said Edward Lawlor) sold in his own house  
 "two half-tierces or half-barrels of porter, which he got from the  
 "said John F. Giles; and that, to the best of his recollection, he  
 "(the said Edward Lawlor) got porter from the said John F.  
 "Giles, sometimes half a barrel in a week—sometimes in a fort-  
 "night, and sometimes in an interval of three weeks; but as  
 "far as he could recollect, on no occasion at a greater interval  
 "than three weeks. Whereas, in truth and in fact, the said Ed-  
 "ward Lawlor did not get, between the 1st day of December  
 "in the year of our Lord 1850, and the 1st day of December  
 "1851, from the plaintiff John F. Giles, twenty-five half tierces  
 "or half barrels of porter; and whereas, in truth and in fact, the  
 "said Edward Lawlor did not get porter from the said John  
 "F. Giles, sometimes in a fortnight; and whereas, in truth and  
 "in fact, on several occasions within said year, a greater interval  
 "than three weeks did elapse, during which the said Edward  
 "Lawlor got no porter whatever from the said John F. Giles.  
 "And so the jurors aforesaid, upon their oath aforesaid, do say  
 "that the said Edward Lawlor, on, &c., at, &c., aforesaid, before  
 "the said Walter Berwick, Assistant-Barrister as aforesaid, he  
 "(the said Walter Berwick) having then and there such power  
 "and authority as aforesaid, by his own most wicked and corrupt  
 "mind, in manner aforesaid, falsely, wickedly, wilfully and cor-  
 "ruptly, did commit wilful and corrupt perjury, to, &c., and con-  
 "trary to the form of the statute in such case made and provided."

After the jury had been sworn, and the prisoner given in  
 charge, Counsel for the prisoner objected to the indictment, and  
 called for an acquittal, upon the ground that the indictment was  
 insufficient in law, inasmuch as it did not aver or show that the  
 perjury was committed on the trial of a cause of action which the  
 Assistant-Barrister had jurisdiction to hear—it merely averred  
 therein that the perjury assigned was committed on the hearing

E. T. 1853.  
*Crim. Appeal.*  
 THE QUEEN  
 v.  
 LAWLOR.

of a "certain civil-bill that came on to be tried in due form of law;" and it did not state or aver that the civil-bill was for a cause of action within the jurisdiction of the Civil-bill Court.

Counsel for the prosecution then, and at the close of the case, called upon the Court to amend the indictment, under the 1st section of the 14 & 15 *Vic.*, c. 106, by introducing the statement that the civil-bill was for the recovery of the sum of £4. 6s. 1½d., for goods sold and delivered by plaintiff to defendant, and for money lent and advanced, and the other money counts.

The Assistant-Barrister refused to make the amendment, on the ground that he had no power of amendment, as it did not appear to him that there was any variance between the statement in the indictment and the evidence offered, but a simple omission of the statement which the prisoner's Counsel alleged to be material and necessary.

It appeared on the evidence for the prosecution, that the prosecutor, who was the agent for a brewery, had advanced, in December 1850, to the traverser, who was a publican, a sum of money, for the purpose of paying for his publican's license for the ensuing year. The agreement between them was, that the defendant should be allowed the sum of 1s. 6d. for each half tierce or half barrel of porter which he should take and pay for during the year from the establishment, and that this allowance should go to defray the money so advanced for the payment of his license; but that if he did not take a sufficient number of half tierces or half barrels during the year, to pay by this allowance the money so advanced, then that the prosecutor should be at liberty to sue him for the balance which should remain due of the moneys thus advanced. At the end of the year 1851, Giles finding, as he alleged, that the traverser had not taken a sufficient quantity of porter to pay by this allowance the moneys so advanced, and a balance also remaining due for porter sold to him, brought a civil-bill process against him, in which the cause of action stated was for £4. 6s. 1½d., for goods sold and delivered, and for the balance remaining due of the moneys so advanced.

The defence set up by the traverser, on the hearing of the civil-

bill, was, that he had taken a sufficient number of half tierces or half barrels of porter within the year to repay the whole amount so advanced; and to sustain this case, he was produced and examined as a witness on his own behalf; and he swore, among other matters, that he took from the prosecutor, in the year beginning on the 1st of December 1850, and ending the 1st of December 1851, twenty-five half barrels or tierces of porter; and if this were true, his debt for the moneys advanced would have been fully discharged. The plaintiff produced his books of account, and a clerk in his establishment swore that, within the period referred to, the traverser only got from his establishment eight half tierces of porter, and that, after making the proper credits and allowances, the balance claimed in the civil-bill process remained due.

The jury found the traverser guilty, on the first assignment of perjury, which averred that he had falsely sworn, on the hearing of the civil-bill, that he had got from the prosecutor twenty-five half tierces or half barrels of porter, between the 1st day of December 1850, and 21st day of December 1851.

Counsel for the prisoner then moved in arrest of judgment, on the ground that the Court of Quarter Sessions had no jurisdiction to try such a case, inasmuch as the perjury, the subject-matter of the foregoing indictment, was not triable at Quarter Sessions, it having been committed before the Assistant-Barrister sitting under the provisions of the Civil-bill Act, and contended that the prisoner should have been tried for such perjury at the Assizes, and not elsewhere.

The magistrates, under the advice of the Assistant-Barrister, refused to arrest the judgment on this ground, but agreed to reserve this question for the consideration of this Court; and the Barrister postponed passing sentence on the prisoner until next Sessions; the Barrister stating at the same time, that had any objection been made, or had he been asked by the prisoner's Counsel, before the jury had been sworn, he should have sent the case to the Assizes, under the circumstances. He further stated that on the application of the prosecutor, after the trial, he granted him a certificate for his expenses under the statute.

E. T. 1853.  
*Crim. Appeal.*  
THE QUEEN  
v.  
LAWLOR.

E. T. 1853.

*Crim. Appeal.*THE QUEEN  
v.

LAWLOR.

*Exham*, for the prisoner.

This indictment is bad on two grounds; first, it does not show that the perjury was committed in a judicial proceeding; secondly, it is not a case which the Assistant-Barrister had jurisdiction to try.

With regard to the second objection, the fact of the Assistant-Barrister having given the certificate for the prisoner's costs shows that he had no jurisdiction to try the case. There are two statutes which authorise him to give this certificate. By 14 & 15 *Vic.*, c. 57, s. 157, it is enacted, that if any person taking an oath, &c., in any action, examination or other proceeding, under the provisions of this Act, shall wilfully and corruptly swear, &c., he shall be deemed guilty of perjury, and shall be liable to be prosecuted accordingly; and if in any such action, &c., the Assistant-Barrister shall deem any witness or party to have so wilfully and corruptly sworn, &c., as that in his opinion such witness or party ought to be prosecuted at the expense of the county within which the witness or party shall have so sworn, &c., and shall certify such opinion in writing, then if any prosecution be instituted, the Court in which it shall take place shall make an order for the payment of the expenses of the prosecution by the treasurer of the county. And by section 19 of 14 & 15 *Vic.*, c. 100, Assistant-Barristers are, among others, authorised, in case it shall appear to them that any person shall have been guilty of perjury in any evidence given before them, to direct such person to be prosecuted, and to commit him until the next Session of Oyer and Terminer for the county in which such perjury was committed, and to give the prosecutor a certificate to entitle him to his costs. This latter section confines the prosecution to the Court of Oyer and Terminer, and must be taken to govern the provisions of the prior enactment.

MONAHAN, C. J. The giving a certificate does not make it a certificate under the statute. You had better go to the other point.

On the other objection, I submit that the Assistant-Barrister being an officer created by statute, the Quarter Sessions has no jurisdiction to try this charge of perjury. The offence was not perjury at Common Law, which is defined to be a wilful false oath, by one lawfully required to depose the truth, in any proceeding in a Court

of Justice: 1 *Hawk. P. C.*, b, 1, c. 27, s. 4. This was perjury *contra formam statuti*; the person giving evidence came as a volunteer, and the Act of Parliament, in admitting his competency as a witness, expressly declares that if he swear falsely he shall be guilty of perjury—he therefore (this being a statutable offence) could not be held amenable at Quarter Sessions, and the indictment in this case charges the offence to be *contra formam statuti*.

E. T. 1853.  
*Crim. Appeal.*  
THE QUEEN  
v.  
LAWLOR.

In England, it would appear that in no case have the Quarter Sessions jurisdiction to try an indictment for perjury. In 2 *Hawk.*, c. 8, s. 64, p. 5, it is said, "Yet it hath been settled of late that "Justices of the Peace have no jurisdiction over forgery or perjury "at the Common Law, the principal reason of which resolution, as I "apprehend was, that inasmuch as the chief end of the institution of "the office of these Justices was for the preservation of the peace "against personal wrongs and open violence."

However, by 31 *G. 3*, c. 18 (*Ir.*) s. 3, Justices are given jurisdiction to try cases of perjury at Common Law, committed within their jurisdiction. Jurisdiction there must mean over an offence committed before themselves, and not territorial jurisdiction; as if so it would give a Justice of the Peace more extended jurisdiction than the Assistant-Barrister, whose jurisdiction is confined to one Riding of the county, whereas the jurisdiction of the Justice extends over the whole county.—[GREENE, B. Does it necessarily follow that by using the words *contra formam statuti*, the offence is an offence under statute and not at Common Law, the statute only regulating the punishment, and not altering the character of the offence?—But the statute only gives the Justices power within their legal jurisdiction.—[MONAHAN, C. J. You contend they would have no jurisdiction if the perjury had been committed in an Inferior Court, within their local jurisdiction.]—4 *Com. Dig., Justice*, b, 1.—[MONAHAN, C. J. May not this be the true reading of the statute of *G. 3*, that a doubt being entertained of the jurisdiction of the Justices, in cases of perjury at Common Law, it therefore enacts that they shall be authorised to try all cases of perjury committed within their jurisdiction?—Jurisdiction is twice named in that section, and must mean legal jurisdiction.—[PIGOT, C. B. A reason for Justices

E. T. 1853. not trying perjuries was, that the words of their commission did not  
*Crim. Appeal.* extend to any offences except *contra pacem*.]—By 28 *Eliz.*, c. 1,  
 THE QUEEN s. 3 (*Ir.*), Justices had jurisdiction over perjuries, provided for by  
 v. that statute.  
 LAWLOB.

But the indictment is bad in form. The Civil-bill Court is a Court of limited jurisdiction, and it must appear on the face of the indictment that the civil-bill action, in which this perjury is alleged to have been committed, was a cause of action within the jurisdiction of the Court. The words in the indictment, "that it came on to be tried in *due form of law*," are not a sufficient statement of jurisdiction, as the Court will not assume any thing in favour of the jurisdiction of an Inferior Court. In the forms of indictments given, the averment of jurisdiction always appears: *Arch. Cr. Pl.* pp. 658, 659. The 31 *G.* 3, c. 18, analagous to 23 *G.* 3, c. 11, provides, that in an indictment for perjury it shall be sufficient to set forth the substance of the offence, and it has been held that this enactment does not excuse a proper averment to show the jurisdiction of the Court. Lord Campbell's Act but extends the provisions of these Acts, it does not vary them: *Regina v. Overton* (a). In *Ryalls v. The Queen* (b), Parke, B., draws the distinction between Courts of general and inferior jurisdiction; he says, "Is not this the distinction, that in Courts of "general jurisdiction you must intend every thing within it, until "the contrary appears. In Courts of limited and inferior jurisdiction nothing can be intended within it, but what is expressly "stated." *Regina v. Bishop* (c).

*Corballis*, for the Crown.

The 14 & 15 *Vic.*, c. 100, was passed for the improvement of the administration of criminal justice, and the 19th section recites the 31 *G.* 3, and that the object of this enactment was to extend the provisions of that statute; and the 20th section provides that it shall be sufficient to set forth the substance of the offence charged, and the 24th section enacts that no indictment shall be held insufficient

(a) 4 Q. B. 83.

(b) 3 Cox, C. C., 254.

(c) 1 Car. & Marsh, 302.

for the want of the averment of any matter unnecessary to be proved; showing that the whole object of the legislation was to get rid of all technical objections. But even if the objection were good, it comes too late, for by the 25th section of that statute, every objection to an indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards. The point has been expressly decided in *Lavey v. The Queen* (a), overruling *Regina v. Overton*. It was there objected that there was no averment that the action in which the perjury was said to have been committed was one over which the Court had jurisdiction, and that no intendment could be made in favour of the jurisdiction of the Court; but it was held that it appeared by necessary implication that such jurisdiction existed, or otherwise the presiding Judge would have no power to administer the oath.—[MONAHAN, C. J. In *The Queen v. Overton*, it was not in express terms alleged to be a judicial proceeding.]

E. T. 1853.  
*Crim. Appeal.*  
THE QUEEN  
v.  
LAWLOR.

The word "contract" is not in the indictment, but "civil-bill" is stated, and that is sufficient.—[GREENE, B. Civil-bill is nothing more than an action pending.]—*Belk v. Broadbent* (b); *Rowland v. Veale* (c). With regard to the objection that the jurisdiction is confined to perjury at Common Law, the statute 31 G. 3 is quite general, and cannot be held to be repealed by the subsequent statutes.

As to the order for expenses of the prisoner, that was made under the provisions of the Civil-bill Act, under which the Assistant-Barrister had full jurisdiction.

*Exham* replied.

MONAHAN, C. J.

The first objection raised in this case is, that the Court of Quarter Sessions had no jurisdiction to determine it. That rested on two grounds—first, that the perjury was committed under the Civil-bill Act, and was not perjury at Common Law; and though

(a) 5 Cox, C. C., 269; S. C., 2 Den., C. C., 504.

(b) 3 T. R. 183.

(c) Cowp. 18.



E. T. 1853. the Quarter Sessions had jurisdiction to try perjury at Common  
*Crim. Appeal.* Law, they had none over that created by statute. Secondly,  
 THE QUEEN assuming that it had jurisdiction, inasmuch as this perjury had  
 v. been committed before the Assistant-Barrister in the course of a  
 LAWLOB. trial by civil-bill, and because the Assistant-Barrister had ordered  
 the prosecution, and given a certificate for expenses, therefore the  
 jurisdiction of the Quarter Sessions was ousted, and the case should  
 have been tried at Assizes.

Another objection was, that the indictment was bad on the face  
 of it—that rested on the case of *Regina v. Overton*.

Another objection was not raised, but suggested, by the Court—  
 whether the matter being apparent on the record, and thus ground  
 of error, the Court could interpose? But it was expressly decided  
 in *Regina v. Martin (a)*, that if such an objection were made in  
 the course of a trial, the case might be reserved notwithstanding,  
 and consequently this Court would have jurisdiction.

With respect to the true construction of the Irish Act, we  
 are of opinion that it gives general jurisdiction in all cases of  
 perjury, and is not confined to cases of perjury at Common Law;  
 and that all cases committed within the local jurisdiction are triable  
 at Quarter Sessions.

Then, as to the jurisdiction of the Barrister awarding costs,  
 it may be collected from the facts that these costs and expenses  
 were awarded; and they must be considered as costs and expenses  
 under the Civil-bill Act. Accordingly, taking the case most  
 favourably for the prisoner, it would appear that the Assistant-  
 Barrister did not think it a case under Lord Campbell's Act—  
 namely, to direct a prosecution; for had he proceeded under that  
 Act, he would have sent the prisoner for trial to the Assizes;  
 but he proceeded under the Civil-bill Act, giving the prosecutor  
 his costs—not binding him over to prosecute, but leaving him at  
 liberty to proceed or not. There is nothing limiting that juris-  
 diction, and he having that jurisdiction, there is nothing confining  
 his directions, under the circumstances, or restricting the juris-  
 diction to particular cases of perjury.

(a) 3 Cox., C. C., 447.

The third objection was, that the indictment was bad, because it did not allege that the civil-bill was one which the Assistant-Barrister had jurisdiction to try; and *Regina v. Overton* was relied on in support of that objection; but the case of *Levy v. Regina* is an express decision upon the point, and it is impossible to distinguish it from the present case. There the indictment contained an averment of the pendency, in the County Court, of an action of contract, and it also contained an allegation, as in the present case, as to the jurisdiction of the Judge to administer the oath. It does not appear in the present case that the civil-bill was founded on contract; but this is no substantial objection, for though it does not appear that the civil-bill was on a contract for such a sum as the Assistant-Barrister had jurisdiction to try, yet there is an allegation that the civil-bill process was pending in that Court, and that it was on the trial of a case in which the Assistant-Barrister had jurisdiction to administer an oath, which he could not have done if the cause of action was outside his jurisdiction. We consider that the case of *Levy v. The Queen* comes within the true construction of the Irish Act and Lord Campbell's Act, and we think that case establishes the law.

E. T. 1853.  
*Exch. Cham.*  
 THE QUEEN  
 v.  
 LAWLOR.

We therefore are of opinion that this case comes within the authority of the case of *Levy v. Regina*, and consequently that the conviction must be affirmed.

M. T. 1853.

Exchequer.

In re M'NALLY.

(Exchequer.)

Nov. 28.

This Court has jurisdiction to admit as an attorney a person who has not served the ordinary apprenticeship, on payment of the general fees. The exercise of this jurisdiction, which is rare, depends on the peculiar circumstances of each case. A practising barrister was admitted as an attorney without serving an apprenticeship, to wind up the business of his deceased brother, who was killed by an accident on a railway, he having been his brother's confidential adviser, acquainted with the suits then pending in his office, the Court being satisfied of his qualifications, and given distinctly to understand that the suits were to be conducted by him for the benefit of the family of the deceased.

J. D. FITZGERALD applied that Mr. M'Nally, a practising barrister and A.M., should be admitted an attorney without having served an apprenticeship. His brother, who was an attorney, had been killed, a short time previously, by an accident on the Great Southern Railway. At the time of his death he was engaged in a number of suits still pending, and had left a wife and family unprovided for, except by the assets which would arise from those suits. No other member of his family was in the legal profession, and the applicant's qualifications were his having practised at the Bar since 1841, having previously spent a year in the chambers of Mr. Molyneux, an eminent pleader—his being his brother's confidential adviser, and intimately acquainted with the suits then pending in his office—and the fact that he had been admitted an apprentice this Term. These facts were stated in an affidavit, and a number of letters from clients of his brother were also read in support of the application. Notice had been served on the Law Society. Counsel relied on 13 & 14 G. 3, as giving the Court jurisdiction, and on *In re Symes (a)*, and *Ex parte Grady (b)*, as precedents for its exercise.

The *Attorney General*, with him *J. Clarke*, on the part of the Law Society, resisted the application, on the ground of the injustice both to the profession of attorneys and to the public, in admitting a person to the profession who had not gone through the preliminary course of education considered necessary to give a knowledge of the profession. The jurisdiction contended for, no doubt, existed, but it was one which should be most sparingly exercised, and each application

(a) 7 Ir. Law Rep. 344.

(b) 2 Law Rec., N. S., 13.

depend on its peculiar circumstances. Symes had been for two years in an office of the Court, and also in a conveyancer's office, both of which would tend to fit him for the profession of an attorney. The Court would not listen to such an application as the present, if made solely for the benefit of the applicant, and there was no statement in the affidavit that the business was to be carried on for the benefit of the widow and family of the deceased.

M. T. 1853.  
*Exchequer.*  
*In re*  
 M'NALLY.

PIGOT, C. B.

The application could not be entertained, unless in the case of a sudden fatality, and for the interest of the family, who could not provide beforehand against it. If it were merely to enable a barrister to enter for his own advantage into a more lucrative branch of the profession, it could not be entertained.

*Fitzgerald.*

The affidavit does state that the applicant makes the application unwillingly, that it is for the purpose of winding up suits, of which the costs, being his brother's assets, are otherwise likely to be lost. But I now state on his behalf, that it is his intention that the whole profits should go to the widow and children. It was not stated in the affidavit, because it was thought it might be considered objectionable by the Court that such an agreement should be made.

The following cases were cited: *Re Lyons* (a); *Ex parte Fitzgibbon* (b); *Ex parte Grady* (c).

PIGOT, C. B.

No question has been raised as to the jurisdiction of the Court. That is settled by *Symes' case*. The question is, whether its exercise should be regarded as exceptional, and as I have already observed, most exceptional. There is a considerable difference between the qualifications and duties of a barrister and an attorney; and an acquaintance with the details of practice acquired in connection with an attorney's office exceeds any thing to be obtained

(a) Jones & C. 197.

(b) Hayes, 139.

(c) 2 Law Rec., N. S., 13.

M. T. 1853. *Exchequer.*  
*In re*  
M'NALLY. from books, or even from practice in Courts; at the same time, I admit that the course of study and training pursued by Mr. M'Nally is calculated to enable him to learn in a shorter period the business of an attorney.

In every application of this kind, however, we are to consider the interests of the family of the deceased, and the interests of not merely the clients in future, but the clients at present. Is Mr. M'Nally qualified to conduct those causes already committed to his brother? He was engaged for some time in the preliminary studies fitting him for his profession, in the chambers of one well known to us all. He has since been a practising barrister, and for three years he has been conversant in his brother's office with these very causes. Having regard to all these things, we have come to the conclusion that he is perfectly competent to carry on that business, and that he is not unqualified for general business. We think the interests of the clients will be better served by him than by a new solicitor. But all this would not be enough, but for the peculiar circumstances under which his brother lost his life. If ever there was a fatality, this was one—it was not like the ordinary fatalities of disease. In these, it is not often but some warning is given to put one on his guard at least, to take the precaution of settling his affairs. Such preparation was impossible here. The occurrence which deprived Mr. M'Nally of life was as sudden as it was calamitous, and, unless in the case of a precisely similar accident, this case cannot be drawn into a precedent.

As to the family and circumstances of the deceased, we are assured that this application is not made for the benefit of the applicant. If so, we should never entertain it—that a barrister, because it was his interest, should therefore, by this ready method, be permitted to change his profession for another. But we are satisfied that his object is to collect the assets of his brother, and terminate the suits in his office; and that in no other way can the family of the deceased be saved from great and continuous calamity. But we entirely disclaim the notion, that because we admit in one case, we are bound to do so in another. Each must depend on its own circumstances.

PENNEFATHER, B.

I concur with the CHIEF BARON, and in the grounds of his judgment. The calamity was as sudden as it was awful. Removal by accident differs very much from death by natural causes; and although even in the latter case there may not be much warning given, yet, generally speaking, there is something to put a person on his guard, so as to induce him to make preparation; a case of accident, therefore, like the present, stands on peculiar grounds. The jurisdiction of the Court unquestionably exists; and Counsel states that the desire and object of the applicant is to provide for the family of the deceased. I think, therefore, the application should be granted.

M. T. 1853.

*Exchequer.*

*In re*

M'NALLY.

GREENE, B.

After some hesitation, I have concurred with the rest of the Court:—I say hesitation, for I have felt very strongly that this extraordinary jurisdiction should be very sparingly exercised; and if I thought that the granting this application would be made a precedent, I would not accede to it. But the circumstances here are so peculiar, that I do not think it will be made so. There is a distinction between a sudden calamity of this nature and even sudden death from natural causes. I wish it to be understood, that on that ground I concur in the judgment of the Court.

Application granted.

E. T. 1854.  
*Common Pleas.*

GRADY v. HUNT.

(*Common Pleas.*)

April 25.

The Full Court will review the decision of a Judge in chamber, in all cases, except where an exclusive jurisdiction is given to the Judge in chamber.

The name of the next friend of an infant plaintiff need not be stated in the writ of summons and plaint before service. It is sufficient if it be inserted before the filing of the writ.

THIS was a motion by way of appeal, to have an order made by Mr. Justice JACKSON, in chamber, on the 1st of April 1854, rescinded, as far as related to the issuing and service of the writ of summons and plaint in this action.

The facts of the case were as follow:—The attorney for the plaintiff, who was a minor, issued a writ of summons and plaint on the 10th of March 1854, without inserting in it the name of the next friend, by whom the minor sued. On the 18th of March, the writ was served on the defendant. The plaintiff's attorney then proceeded, in compliance with the 50th section of the 16 & 17 Vic, c. 113 (Common Law Procedure Act), to obtain the consent of a party to act as a next friend for the minor; and the plaintiff's mother having consented to act, he transmitted her consent, duly verified, to Dublin, to be filed according to the rules of the Court. It appeared, however, that the summons and plaint had been filed before the consent reached Dublin. On the 1st of April, the defendant obtained an order in chamber, to have the writ and all the proceedings in the case set aside for irregularity. The plaintiff now sought to have that order rescinded, as far as related to the issuing and service of the writ, contending that the proceedings were to this extent regular, according to the practice of the Court; and that the filing of the summons and plaint, without having previously entered a rule to appoint a next friend, was the only irregularity in the case.

*David Lynch* (with him *M. Morris*), in support of the motion.

*Robinson* (with him *Concannon*) took a preliminary objection. An appeal cannot be brought before the Full Court, to set aside,

on the same state of facts, an order made by a single Judge in chamber: *Rosset v. Hartley* (a); *Hawkins v. Akrill* (b).

E. T. 1854.  
Common Pleas.

GRADY

v.

HUNT.

April 27.

*D. Lynch*, in support of the motion.

As to the preliminary objection. It has been long the practice in the Full Court to entertain an appeal from the decision of a Judge in chamber; and the authorities will be found to support that practice. *Hawkins v. Akrill* was a motion not brought on by way of appeal. In that case, the Court said that the notice was improperly framed; but the notice having been amended, the case was heard on its merits. *Graham v. Connell* (c) shows that, although there may be exceptional cases, the general rule is, that an appeal lies from the decision of a Judge in chamber. In *The Kilkenny and Great Southern and Western Railway Company v. Fielden* (d), the Court referred to *Gibbons v. Spalding* (e), and *Pike v. Davis* (f), and said that the principle on which they proceed is, that in all cases where a Judge in chamber acts as deputy of the Full Court—that is, disposes of applications which, but for the press of business, would be disposed of by the Court itself—the Court will review his decision; but that it was otherwise where the Judge in chamber had an independent jurisdiction. He also cited *Witham v. Lynch* (g).

As to the merits of the present motion, the order of the Judge in chamber should have only set aside the filing of the summons and plaint. The writ itself was regular. The 50th section only requires that the name of the next friend should appear in the summons and plaint when filed; it does not require it to be inserted in the writ when issued. The plaintiff wishes to make use of the original writ, for the purpose of avoiding the Statute of Limitations.

*Robinson and Concannon*, contra.

As to the preliminary objection. The Common Law Procedure

(a) 1 H. & W. 581.

(b) 1 L. M. & P. Pr. Cas. 242.

(c) 1 L. M. & P. Pr. Cas. 438.

(d) 6 Exch. 82, n. a.

(e) 11 M. & W. 173.

(f) 6 M. & W. 546.

(g) 1 Exch. 391.



E. T. 1854. Act gives distinctly the right of appeal where it was intended that such right should exist. The 102nd section is the only one which gives a right of appeal, and it is confined to an appeal from the decision of a single Judge on the settlement of issues. As to the merits of this motion, the order in chamber was right *in omnibus*. The 50th section had not been complied with; the writ should, at its issue, have contained the name of the next friend. The Act contemplated that the summons and plaint originally taken out should be the very document, *ipsisimis verbis*, placed on the file. This is evident from the 8th, 32nd and 37th sections. There is no machinery under the Act, by which the plaintiff can alter the writ as originally issued, by inserting the name of the next friend. In *Byrne v. Walsh* (a), where a writ had been issued by an infant, in the name of his next friend, and a parliamentary appearance entered thereon, and a declaration filed, the proceedings were set aside for irregularity; leave of the Court not having been obtained to sue by *prochein ami*, at the time of issuing the writ or entering the appearance. Suppose a plea of abatement had been put in, on the ground of the infant having sued by attorney, surely the judgment would be that the writ should be quashed.

*Common Pleas.*  
GRADY  
v.  
HUNT.

By the Common Law Procedure Act, the copy served must be the same as that filed.

*M. Morris.*

The practice which has been adopted in this case is recognised in all the Courts. It is clear, from the 37th section of the Common Law Procedure Act, that the summons and plaint is not considered as a pleading until filed.

MONAHAN, C. J.

As to the preliminary objection in this case, we have no difficulty whatever in deciding that the Full Court has power to review the decision of a single Judge. That objection then having been got rid of, we now come to the real question in the case, which is one of some importance, as involving the consider-

(a) 5 Ir. Jur. 217.

ation of what is the true construction of the 50th section of the Common Law Procedure Amendment Act. The question in the case is shortly this, whether, in the case of an action, brought by a person under age, the infant is bound to name the next friend by whom he sues, in the writ, at the time of issuing it; or whether it is sufficient if the name of the next friend be inserted in the summons and plaint, before the filing of that document? It appears to us that the true construction of the section is, that it is not necessary to insert the name of the next friend in the writ, at the time of suing it out. The first portion of the 50th section provides, that "In any case, in which the plaintiff shall be a minor or lunatic, and before the filing of the summons and plaint as a pleading, a consent in writing, signed by some fit and proper person, to act as next friend to such minor or lunatic, together with an affidavit to verify the signature of such person, shall be lodged in the office of the Clerk of the Rules, who shall thereupon enter a rule that such person shall be at liberty to sue as next friend for such minor or lunatic." Now, if the section stopped there, it would be clear that the name of the next friend need not be mentioned in the writ when issued; but the difficulty arises from the succeeding words in the section, "And the name of such next friend shall be mentioned in the said summons and plaint, as next friend to said minor or lunatic." Now, we think that the words, "such next friend," must mean the person who has consented to act as next friend in the case, whose consent has, in conformity with the 50th section, been lodged with the Clerk of the Rules, and who has been allowed to act as next friend by a rule issued out of the office of the Court; and that therefore, although the section might, perhaps, be more clearly worded, still the fair construction of the section seems to be (and it has been stated to us that the practice of the office is in conformity with such a construction) that it is sufficient to insert the name of the next friend at the time of filing the summons and plaint as a pleading. Accordingly, as in this view of the case, the original order was correct, the order of Judge JACKSON, which set aside the entire proceedings, must be modified in that respect.

E. T. 1854.  
*Common Pleas.*  
 GRADY  
 v.  
 HUNT.

E. T. 1854.  
*Common Pleas.*

GRADY  
 v.  
 HUNT.

TORRENS, J.

It does not appear to me that the construction which the Court are now putting on the Act will have the effect of inflicting any injury or inconvenience upon the defendant; he is in the same position, by the name of the minor's next friend being inserted in the summons and plaint, when it is filed, as he would be if it had been inserted originally at the time of issuing the writ.

JACKSON, J.

Having made the order in this case, when it came before me in chamber, I wish to express my entire concurrence in the present decision of the Court. The whole question turns on the construction of the 50th section; and that section appears only to contemplate the introduction of the name of the next friend, when the summons and plaint is filed—that is when, in fact, it first becomes a pleading.

*Robinson*, on behalf of the defendant, applied for costs. The defendant is entitled to the costs, both of the present motion and of the motion in chamber, both motions having been caused by the plaintiff's non-compliance with the terms of the 50th section, in not entering a rule to appoint a next friend, before filing the summons and plaint: *Lessee Walker v. Dwyer* (a).

*Morris*, contra.

It is well settled, that if a party, by his notice, seeks to set aside more of his adversary's proceedings than are irregular, the rule, if granted, will be without costs: *Johnstone's General Orders and Practice* (b); *Grogan v. Lee* (c); *Cox v. Bucknall* (d).

MONAHAN, C. J.

The difficulty is, that the plaintiff appears, by his notice here, to offer to pay the costs of the present motion. We think the best course is, to let each party bear his own costs of both motions.

(a) 4 Ir. Law Rep. 364.

(b) See note to the 179th General Order, p. 174.

(c) 5 Taunt. 651.

(d) 5 B. & Ald. 893.

E. T. 1854.  
*Common Pleas.*

## HARRISON and others v. LYNCH.

May 6.

D. C. HERON moved that the writ of summons and plaint in this cause might be set aside or amended, and that five out of the first six counts might be struck out, and such of the *indebitatus* counts in respect of which a cause of action was not stated in the bill of particulars, on the grounds that the plaintiffs had but one cause of action; that the summons and plaint did not contain a true and succinct statement of the plaintiffs' cause of action; and that it was needlessly prolix, and calculated to embarrass the defendant in his defence.

The Court will not set aside a writ of summons and plaint, if signed by Counsel, on the ground that it contains several counts varying the cause of action, where the plaintiff does not appear to have unnecessarily re-stated his complaint, with a view to oppress or embarrass the defendant.

The first count of the summons and plaint set forth that on the 9th of December 1853, in consideration that the defendant had agreed to buy of the plaintiffs 449 chests of Congou tea, at the price of one shilling and ninepence per pound, the goods to be accepted, and the price paid by the defendant before the delivery of the goods, and the goods to be delivered by the plaintiffs, on the defendant paying the price, at or before the expiration of three calendar months after the sale, at the option of the defendant; "and that the plaintiffs, at the request of the defendant, had then "promised the defendant to deliver the said goods to the defendant "according to the aforesaid terms, and in all respects to perform "and fulfil, &c.; the defendant then promised the plaintiffs to "accept the said goods from the plaintiffs, and to pay them for "the same according to the aforesaid terms." The plaint then averred "that although the plaintiffs were ready and willing to "deliver the goods, and although the said period of three calendar "months expired before the commencement of this suit, yet the "defendant did not nor would accept the said goods, or any part "thereof, from the plaintiffs, or pay them for the same, according "to the aforesaid terms; and afterwards, on or about the 10th day

E. T. 1854. "of March 1854, and after the expiration of the said period of  
*Common Pleas.* "three calendar months, the plaintiffs were forced to re-sell, and  
 HARRISON "did re-sell the said goods, except one chest of tea, parcel thereof,  
 v. "at and for a much less price than the price so to have been  
 LYNCH. "paid by the defendant for the same, at a loss and deficiency of  
 "£909. 11s. 10d., besides the sum of £18. 0s. 3d., the costs and  
 "charges of the said re-sale—making together a sum of £927.  
 "12s. 1d.; and the plaintiffs were and are, by means of the pre-  
 "mises, otherwise damnified."

The second count was also for not accepting 449 chests of tea, but the terms of the sale were thus set forth:—"The said goods "to be accepted by the defendant, and the said price to be paid "by the defendant to the plaintiffs before the delivery of the goods, "and the said goods to be delivered by the plaintiffs to the defend- "ant, on the defendant paying the said price." The breach ran thus:—"Yet the defendant did not nor would accept the said "goods, or any part thereof, from the plaintiffs, or pay them for "the same according to the aforesaid terms, and the plaintiffs were "and are by means of the premises greatly damnified."

The third count was the same as the first—substituting 400 chests of tea instead of 449 chests, and reducing the special damage in proportion.

The fourth was the same as the second, substituting 400 chests of tea for 449 chests.

The fifth count was the same as the first, substituting forty-nine chests of tea instead of 449 chests, and reducing the special damage proportionably.

The sixth count was the same as the second, substituting forty-nine chests of tea instead of 449 chests. There were also counts for goods bargained and sold—goods sold and delivered, and for money due on an account stated. "And the plaintiffs pray judg- "ment against the said defendant, to recover a sum of £1000 "damages, and also the said last-mentioned sum of £927. 12s. 1d., "amounting together to the sum of £1927. 12s. 1d., and interest on "said sum of £927. 12s. 1d., and his costs of suit; therefore," &c.

"INDORSEMENT OF PARTICULARS.			
9th and 12th Dec. 1853.	To 448 chests of Congou, ex Rosamond	...	...
7th April 1854.	By proceeds of ditto, as per account of sales furnished	...	...
		£3454	6 6
		2534	8 5
		919	18 1
To the price of one chest delivered	...	7	14 0
		£927	12 1"

E. T. 1854.  
*Common Pleas.*  
**HARRISON**  
*v.*  
**LYNCH.**

The defendant, in his affidavit, stated that the plaintiffs had but one cause of action against him—namely, the non-acceptance by him of tea alleged to be sold to him by them. He stated, moreover, that he had a just and legal defence upon the merits—that the cause of action was stated in the particulars indorsed on the writ—that he was embarrassed in his defence by the unnecessary and prolix statements in the plaint—and that he did not make this application for the purpose of delay.

The plaintiffs' attorney, in his answering affidavit, swore that he was instructed by the plaintiffs, and believed, that one transaction between plaintiffs and defendant in respect of 400 chests of tea, and no more, took place on the 9th of December 1853; and that another transaction in respect of forty-nine chests of tea took place between the parties on the 12th of December 1853; that the notes in writing which were regarded as the contract, or as evidence of them, formed portion of the instruction of Counsel who prepared the summons and plaint; "that deponent is advised and believes, "that whether said two notes in writing are to be construed together "as one contract, or as two distinct contracts, or as evidence thereof "respectively, is matter of much doubt and uncertainty in point of "law; and also that in consequence of the general and ambiguous "terms of the said notes, it will become necessary to resort to "parol testimony of the usage of trade, and of the meaning "assigned by persons in the trade, to explain the same in some "respects. And this deponent further saith he is advised it is "in particular doubtful whether the teas in plaint mentioned were "to be paid for forthwith on delivery, or whether the defendant "should have three months to pay for same." The affidavit also stated positively that the plaint was not framed with any view to prolixity, or to make costs, or to prejudice, embarrass or delay the fair trial of the action.

E. T. 1854. *Heron* cited *Nicholson v. Croft* (a); *Meeke v. Oxlade* (b);  
*Common Pleas.* *Frazer v. Shaw* (c); *Wood v. Grace* (d); 1 *Chitty on Pleading*,  
 HARRISON  
 v.  
 LYNCH.  
 p. 445, 5th ed.

*R. Armstrong* and *Hemphill*, contra, were not called on.

MONAHAN, C. J.

This motion must be refused. We are of opinion that the true construction of the Act is, that the party should state succinctly and clearly his cause of action; but the law in England, which obliges a party to have but one count for the same cause of action, has not ever extended to Ireland, and for very good reasons. We do not say that, if the party appeared to have oppressively stated and re-stated his cause of action, we might not be prepared to set aside or correct his pleading. But that does not appear to be the case in the present instance; and certainly where, in an action on a contract, a difficulty exists as to the construction of a document which is material to the case, a party must be at liberty to vary his pleading for his own safety. If the construction of a contract be doubtful, it is only right that the pleader should exercise his discretion, and put it in both ways, in order that he may not be turned round, by the Court taking one view while he takes another. We also think that where Counsel's signature is to a pleading, that is equivalent to a certificate by him that it is a proper pleading. Some credit must be given to Counsel's signature, and unless it appears clear that he has abused that privilege, the Court will not interfere in this way.

As to the additional expense, of which so much has been said, I am very sure that the expense of this motion will considerably exceed the additional expense in the pleading; and of course, on the trial, the defendant will be entitled to the costs of such issues as are not found for the plaintiffs.

Motion refused, with costs.

(a) 2 Burr. 1188.

(b) 1 B. & P., N. R., 289.

(c) 7 D. & R. 383.

(d) Barnes, 344.

M. T. 1853.  
*Common Pleas.*

RODOCANACHI v. SODERHOLM.

Nov. 12.

MACDONOUGH (with whom was *Sullivan*) moved that the defendant, arrested under a Judge's fiat in this case, might be discharged from the custody of the Sheriff of the county of the city of Cork, and from the process issued in the cause, so that if necessary the order of the Judge and the *capias ad satisfaciendum* might be set aside. The affidavit to hold to bail stated that the plaintiffs carried on business in London, at Odessa and Marseilles, and that on the 18th of November 1852, a charter-party was executed between them and the defendant, by which the latter, as master of the ship *Minnette*, then at anchor, in the port of Algiers, undertook that the said vessel should proceed from Algiers to Gallipoli, there to receive orders from the plaintiffs' correspondent for landing at some port to be fixed by them between Salonica and Constantinople, and having received a full cargo at such port, from the agents of the plaintiffs, to proceed thence to Cork or Falmouth, to await orders as to the port of discharge. That on the arrival of the vessel at Constantinople, the agent of the plaintiffs agreed that in place of loading at a port between Salonica and Constantinople, the *Minnette* should proceed to the ports of Akiallo and Burgos, in the Black Sea, distant about a hundred miles from Constantinople, and there load her cargo for the United Kingdom, and that the captain should be paid an additional freight of one shilling and sixpence on every quarter of beans, and so in proportion as to other goods. That in pursuance of these arrangements, the plaintiffs' correspondents shipped on board the *Minnette* 3414 quarters of wheat, the bill of lading expressing it to be shipped for the account of the plaintiffs, according to the terms of the charter-party, and the further agreement with the plaintiffs' agent. That the *Minnette* sailed from Burgos on the 15th of February 1853, and arrived in Constantinople on the 21st of that month, and that the plaintiffs had been informed by their

It is the duty of the plaintiff, applying for a Judge's fiat, to set forth, in his affidavit to hold to bail, all the facts of the case in the first instance; and he is not justified in withholding facts from the knowledge of the Judge, on the supposition that they are not material to the case.

Costs are not given in an appeal motion from the decision of the Judge in chamber, when the Court differs from him in opinion.



M. T. 1853. partners there, that within a day after the arrival of the ship they  
*Common Pleas.* received intelligence that the defendant was taking measures for  
 RODOCANA- transshipping the cargo. That on hearing this, the plaintiffs'  
 CHI  
 v  
 SODERHOLM. correspondents protested to the defendant against his proceeding  
 to do so, but that notwithstanding their remonstrances the defendant  
 caused the entire cargo to be unladen, and transhipped portions of  
 it to the Lucia, a vessel then lying at Constantinople, at an  
 advanced rate of freight above that originally agreed on, of 1s. 9d.  
 a quarter; and that the defendant then brought a claim for freight  
*pro rata*, upon the entire cargo, to defray which he sold 1500  
 quarters of wheat. That the plaintiffs had been informed by a  
 letter from Lloyds' agent at Constantinople, that the Minnette, after  
 the sale and transshipment of the cargo, was chartered by the  
 defendant to proceed to Odessa, there to load a fresh cargo for the  
 United Kingdom, with which the defendant arrived at Cork in the  
 month of September. That the Lucia arrived with that portion  
 of the cargo of beans, which had been transhipped to her on the  
 6th of July, and that in consequence of the advanced rate at which  
 she was freighted, the plaintiffs were obliged to pay a sum of £150,  
 as merchants, more than would have been payable under the charter-  
 party in the Minnette, and that their loss by the sale of that portion  
 of the cargo which was not transhipped amounted to £2500. That  
 the Minnette was a Swedish vessel, and that the owners reside out  
 of the jurisdiction, and that the plaintiffs believed that the de-  
 fendant would abscond as soon as he discovered that the plaintiffs  
 intended to make a claim against him in respect of the sale and  
 transshipment of the cargo of the Minnette, unless he should be  
 held to bail. The affidavit of the defendant stated that on the  
 16th of February 1853, shortly after he had left the port of Burgos,  
 he encountered a heavy gale, and that in order to save the vessel,  
 which he alleged was in imminent danger of being wrecked, he  
 was obliged to carry a great press of sail, for the purpose of getting  
 the vessel off the shore, in consequence of which heavy seas fell into  
 the ship, and the hull, rigging and spars sustained so much damage,  
 that it became necessary to put into port, and after much difficulty  
 the vessel put into Neokeri on the Bosphorus, on the 10th of

February. That on the 21st of February, the defendant entered a formal protest of the damage which the vessel sustained, whereupon surveyors were appointed by the Swedish and Norwegian *Chargé d'Affaires* at Constantinople, according to the custom of that port, to survey the vessel. That the surveyors examined the ship, and seeing that it had suffered considerable damage from the storm, and was unable to proceed on her voyage, and that it would be some months before the repairs would be made, in consequence of the bad weather which was then setting in, the heavy expense of storage and risk to the cargo from exposure, the Court of the Swedish and Norwegian *Chargé d'Affaires* directed, for the interest of the owner of the cargo, that it should be immediately forwarded to its destination by a ship of the first class, to be chartered for the account of whom it might concern, and ordered the defendant to bring the ship to Constantinople for repairs, and that she should then finish her voyage. That the *Minnette* arrived at Constantinople on the 29th of February, and that on the day of her arrival, 15605 kilogrammes of wheat, her cargo, were, under the direction of the said *Chargé d'Affaires*, transhipped to the *Lucia*, the remainder being kept by the said authorities, to defray the expense of repairing the damage, paying the freight and other charges, as ordered by the said *Chargé d'Affaires*, and that the defendant, being a stranger, was obliged to leave the business in their hands, they being entitled by the laws at Constantinople to act in the matter, independent of the defendant. That agents, representing all the parties concerned, attended the Court of the *Chargé d'Affaires*, and that Messrs. P. Rodocanachi & Co., merchants, at Constantinople, who represented themselves to be the owners of the cargo, had full knowledge of all the proceedings. That on the report of the sum necessary to repair the damages sustained by the *Minnette* being brought before the Court, and proper averages of the amount to be contributed by the ship's freight and cargo being taken, the Court allowed one-half the sum mentioned in the charter-party as a *pro rata* freight, and having failed to borrow money on the entire cargo, it was decreed by the Court that one-half the cargo should be sold, to defray the expense of repairs, and one-half the freight; that such

M. T. 1853.  
*Common Pleas*  
 RODOCANA-  
 CHI  
 v.  
 SODERHOLM.

M. T. 1853. sale was accordingly made, and the balance, amounting to 12s. 6d.,  
*Common Pleas* lodged to the credit of the Messrs. Rodocanachi in Chancellerie, at  
 RODOCANA- Constantinople. That the defendant was obliged to remain for  
 CHI repairs at Constantinople until the 28th of April, when he entered  
 v. into a new charter-party, to take a cargo from Odessa to England,  
 SODERHOLM. calling at Cork or Falmouth; that he was arrested at Cork while  
 on his voyage.

The plaintiffs' affidavit, in reply, impeached the judgment of the *Chargé d'Affaires*, and charged collusion between the Swedish Consul and the defendant, and that the former had acted contrary to the laws of England, to the laws of nations, and the custom of general average. They explained their silence in their original affidavit, as to the proceedings in the Court at Constantinople, by stating "that they considered the proceedings at Constantinople as no defence to the action."

An application was made on behalf of the defendant, before Mr. Justice JACKSON, in chamber, during the Vacation, to have the fiat set aside, on the ground of suppression of material facts, the insufficiency of the affidavit to hold to bail, and that no cause of action existed. The defendant made on that occasion the affidavit relied on upon the present motion, which was now brought before the Full Court, by way of appeal.

Nov. 12. *Macdonogh* (with him *E. Sullivan*), for the defendant.

The defendant ought to be discharged, as having been improperly arrested. He relies upon the following propositions:—First, that there was fraud upon the part of the plaintiffs, in suppressing facts in the affidavit on which the fiat was obtained; secondly, that the transshipment was right; thirdly, that the general average was right, according to the custom of the foreign port; fourthly, that there is no authority to justify the arrest—the plaintiffs being privy to the proceedings abroad, and cognizant of the decree. Unless the affidavit on which the fiat was obtained shows satisfactorily that the arrest was proper at the time when it was made, no subsequent facts can warrant the arrest. From the fiat it is evident that no sufficient grounds were shown for supposing that the de-

fendant was likely to leave the country. As to the power of a master over his cargo in case of stress of weather, the case of *The Gratitude* (a) is an authority, and supports the conduct of the defendant here. It is not necessary to argue this case as one of general average; but the defendant has a right to insist that the foreign Court, where the matter was investigated and decided, was a Court of competent jurisdiction; and also that the plaintiffs, having been privy to the proceedings there, through the intervention of their agents, and having submitted to the decision of that Court, are now estopped from denying its jurisdiction. The suppression in the affidavit on which the fiat was obtained is of itself sufficient to entitle the defendant to his discharge. In *Burness v. Guirano-vich* (b), the Court ordered the discharge of a defendant who had been arrested on a *capias*, it having been proved that the plaintiff, in obtaining the order, had concealed several important facts. As to general average, *Walpole v. Ewer* (c) shows that the usage of the foreign Court in which the decree was made must govern the case on that point.—[MONAHAN, C. J. Would the Consul of one nation have authority to decide, not only between subjects of his own country, but also between subjects of another country, or between subjects of his own country and subjects of another?—In *Walpole v. Ewer*, Lord Kenyon said:—"By the law of England, a lender upon *respondentia* is not liable to average losses, but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends that as, by the law of Denmark, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The Danish Consul has proved that he received a judgment of the Court of Copenhagen—the decretal part of which proves the law of Denmark to be as the plaintiff has stated it. . . . It seems as if, in this case, the underwriters were bound by the law of the country to which the contract relates."

M. T. 1853:  
Common Pleas  
BODOCANA-  
CHI  
v.  
SODERHOLM.

The transhipment was right; *Shipton v. Thornton* (d). In.

(a) 3 Rob. Adm. Cas. 240, 272.

(b) 7 Dow. & L. 235.

(c) 2 Park. on Mar. Ins. 899.

(d) 9 Ad. & E. 314.

M. T. 1853.  
*Common Pleas*  
 RODOCANA-  
 CHI  
 v.  
 SODERHOLM.

that case Lord Denman, in his judgment, cites (a) a *dictum* expressed by Lord *Tenterden* in his book *on Shipping* (part 3, c. 3, 8 b, p. 241, 5th ed.) :—"The master should always bear in mind "that it is his duty to convey the cargo to its place of destination. "This is the purpose for which he has been entrusted with it; and "this purpose he is bound to accomplish by every reasonable and "practicable method." As to general average: *Abbott on Shipping*, p. 474 (ed. of 1844); *Da Costa v. Newenham* (b); *Plummer v. Wildman* (c); *Power v. Whitmore* (d); *Simonds v. White* (e); were cited. The defendant is entitled, on this motion, to go into the question of his original liability, and the Court will decide on the validity of the debt, even on a motion to discharge him from custody: *Gadsen v. McLean* (f); *Gibbons v. Spalding* (g); *Graham v. Sandrinelli* (h); *Talbot v. Bulkeley* (i); *Pegler v. Hislop* (k).

*Fitzgibbon*, for the plaintiffs.

The plaintiffs, having a house for business in London, are to be considered as British subjects. In *Abbott on Shipping*, p. 365 (ed. of 1847, c. 4), it is laid down :—"The disposal, however, of "the cargo by the master, is a matter that requires the utmost "caution on his part. He should always bear in mind that "it is his duty to convey it to the place of destination. . . "Every act that is not properly and strictly in furtherance of "this duty is an act for which both he and his owners may be "made responsible; and the law of England does not recognise the "authority of any tribunal, or officer acting upon *his* suggestion, "or at *his* instance, but will scrutinise *their* acts as much as his "own."

The Consul at Constantinople was put in motion by the defendant himself, and the proceedings on that occasion were at his sugges-

(a) page 333.

(b) 2 T. R. 407.

(c) 3 M. & S. 482.

(d) 4 M. & S. 141.

(e) 2 B. & C. 805.

(f) 9 C. B. 283.

(g) 11 M. & W. 173.

(h) 4 D. & L. 317.

(i) 4 D. & L. 319.

(k) 5 D. & L. 223; S. C., 1 Exch. 437.

tion. Such proceedings were a mockery, and their omission in the plaintiffs' affidavit ought not to affect the case.—[MONAHAN, C. J. My recollection of the practice in cases of *ne exeat regno*, is, that if there has been a suppression of facts which were in the knowledge of the party when he made the affidavit, the Court will not listen to him saying the facts were not material, unless he can show that they were *utterly immaterial*. The materiality ought to be for the decision of the Court. The plaintiffs' affidavit here being entirely silent as to the proceedings abroad, it was impossible for the defendant to anticipate that a case of fraud would be made against him. It was the duty of the plaintiffs to refer to these proceedings, and to impeach them.]

M. T. 1853.  
Common Pleas  
BODOCANA-  
CHI  
v.  
SODERHOLM.

*George Foley*, on the same side, was directed by the Court to apply his argument to the question—whether the plaintiffs were not bound to have brought forward all the facts of the case in their affidavit on which they applied for their fiat?

The defendants were only bound to show, first, that they had a probable cause of action, and, secondly, that there was a probability of the defendant's leaving the country. The words of the statute (3 & 4 Vic., c. 105, s. 2,) are:—"That such plaintiff has a "cause of action against the defendant, to the amount of £20 or "upwards, or has sustained damage to that amount, and that there "is probable cause for believing that the defendant is about to "quit Ireland." As to the latter point, it has been decided that the mere fact of the defendant being the captain of a vessel, and therefore likely to leave the country in the discharge of his duty, was sufficient to warrant his arrest. So, in the case of an Irish barrister in England, Vaughan, J., in his judgment in *Bateman v. Dunn* (a), says:—"The defendant is a barrister in the Irish "Courts, and Term was about to begin; and it was, therefore, "likely that he would be desirous of returning to the place where "his business was, and there is probable cause for believing that "he was about to quit England, even on his own affidavit." In *Larchin v. Willan* (b), it was held that the fact of the defendant

(a) 7 D. P. C. 114.

(b) 7 D. P. C. 11.

M. T. 1853.  
*Common Pleas*

RODOCANA-  
CHI

v.  
SODERHOLM.

being about to proceed to Ireland to join his regiment was sufficient to warrant his arrest.

As to the former point, the cause of action—[Counsel here commented on the facts as they appeared on the plaintiffs' affidavit on the present motion.]—[MONAHAN, C. J. Assuming the facts to be as you state them—suppose a *bonâ fide* necessity existed for the defendant putting into Constantinople, and that the transshipment was right, have you any authority for saying that the law of England, and not the law of Constantinople, ought to regulate the case? Would not Constantinople be the port of discharge rendered necessary by the circumstances, though not mentioned in the original contract?—We arraign the proceedings at Constantinople *in toto*, and deny the jurisdiction of the Consul—[MONAHAN, C. J. Have you any authority to show that you had a right to take upon yourselves to decide on the materiality of the facts, and to suppress them in the affidavit?]

*Sullivan*, for the defendant, here cited *De Feucheres v. Daves* (a). In that case the Master of the Rolls said:—"Lord Cottenham established the rule, that where an *ex parte* injunction is obtained, "upon a suppression of material facts, it will be dissolved on that "ground alone, although it might appear, on the application to "dissolve it, that there were ample merits to sustain it."

In *Butt v. Jackson* (b), it was decided that all the facts as they occurred, whether material or not, ought to be set forth.—[MONAHAN, C. J. I remember that in the Rolls Court, Sir Michael O'Loughlen used always to discharge an order for a receiver, when it appeared that facts had been suppressed, whether those facts were material or not.]

*Foley* cited *M'Gauran v. Furnell* (c); *Howden v. Rogers* (d); *Roddam v. Hetherington* (e).—[MONAHAN, C. J. There is a distinction between those cases and the present. In this case there

(a) 11 Beav. 46.

(b) 10 Ir. Law Rep. 120.

(c) S. & Sc. 263.

(d) 1 Ves. & B. 129.

(e) 5 Ves. jun. 91.

is a false statement in fact in the affidavit—namely, that the defendant went into Constantinople, and sold the cargo himself, of his own authority: whereas the plaintiffs' case now is, that he entered into collusive proceedings with the Consul. The Judge who granted the order should have been afforded an opportunity of judging whether that was the same thing. His opinion was never taken on the question.—BALL, J. I have great doubt that if the facts, as now stated, had appeared on the affidavit, I would have granted the fiat, had I been the Judge applied to.—TORRENS, J. I beg leave to say that in that case I would not have granted the fiat.]

M. T. 1853.

*Common Pleas*

BODOCANA-

CHI

v.

SODERHOLM.

MONAHAN, C. J.

We wish it to be distinctly understood that our decision in the present case cannot interfere with any of the other important questions which may ultimately arise; but is grounded entirely upon the consideration that the whole of this case was not candidly and fully brought forward on the original application; but that, on the contrary, the plaintiffs have been guilty of the suppression of facts which ought to have been originally stated.

Before the passing of the Act (3 & 4 Vic., c. 105), it was well established that if a party swore to the subsistence of a legal debt, that was in itself conclusive; but it is now decided that, according to the true construction of the Act referred to, the affidavit of the party obtaining the fiat is not conclusive as to the existence of the debt; but that the party arrested may, by appearance of himself or others, bring all the facts before the Court or a Judge; and that the question for the Court or Judge is, not merely whether the affidavit was originally sufficient, but whether, upon the whole facts of the case, the party ought to be detained in custody? It is quite clear that in such a case the party, in making his affidavit for the purpose of obtaining a fiat, ought not to be guilty of any suppression of material facts, but should state all the facts and circumstances of the case candidly and fully. Now, in the present case, the plaintiff stated in his affidavit, that he had entered into a certain contract



M. T. 1858.  
*Common Pleas*  
 RODOCANA-  
 CHI  
 v.  
 SODERHOLM.

with the captain of the *Minnette*; and that the captain had, in violation of that contract, put into Constantinople, and sold half the cargo of the vessel—making it appear that the captain had done this as his own act, and by his own authority, and without any sanction or justification whatever. The real facts appear to be, that he put into Constantinople, because his vessel was out of repair, and unable to proceed upon her voyage—that the matter was there investigated, and that notice of the proceedings reached the plaintiffs—that the plaintiffs intervened, and that all the proceedings with reference to the sale of half the cargo were carried on by the direction of the Swedish Consul, and with the privity of the plaintiffs. It is not necessary for this Court to decide whether ultimately the defendant in this case may not be liable for his conduct in these transactions; we merely decide this—that it was the duty of the party applying for the fiat to bring forward these facts fully and candidly before the Judge to whom he made such an application; and that he not having done so, we must now order this defendant to be discharged.

TORRENS, J.

Whatever may be the result of this case at the trial, it appears from the facts now stated, that the proceedings were at the time conclusive. All these facts will be investigated at the trial. But that was not the case upon which the party was arrested. The case now made is that he feloniously possessed himself of half the cargo, and, having entered into a collusive arrangement with the authorities at Constantinople, sold it.

That case ought to have been disclosed before the Judge who was asked to grant the fiat. The granting a fiat is an *ex parte* proceeding, and in all *ex parte* proceedings the applicant is bound to lay the whole case before the Court, in order that it may be able to judge of the propriety of granting the application. In the present instance, a vital part of the case was omitted, and I feel strongly that the party making the affidavit was guilty of a material suppression, and therefore the defendant should be discharged.

BALL, J.

What weighs with me in this case is, that the statements in the affidavits, upon which the fiat was obtained, established a case totally different from the one now brought before the Court. The case before the Judge who made the order was merely a case in which the captain was charged with having made away with the proceeds of the sale of half the cargo, whereas it now appears that the act of the captain was not the act of a man taking upon himself, of his own authority, to dispose of half of the cargo without any justification, but the act of a man having the judgment of a Court authorising him to do the very thing which is charged against him as a felony. Now, I say that that is a suppression sufficient in itself to justify this Court in discharging the defendant. The plaintiffs' original affidavit should have stated that the defendant had acted under the sanction of a Court which assumed jurisdiction to make the decree in question. For whether that decree was right or not, still it was a decree in force, unless there had been an order to stop the proceedings, and it was indifferent to the Court whether there was an appeal or not; and that can be no answer to the fact that the affidavit contained on the face of it a totally different state of facts. The statement should have been made in the affidavit, that the captain had obtained a decree of an apparently competent Court. Where a party not only suppresses facts, but also states a different case, he must take the consequences of such an act on his own part.

JACKSON, J.

When this case was brought before me in chamber, the case was argued on its merits; and I wish to say that, concurring as I do most fully with the present ruling of the Court, I then acted on all the materials before me, and that this fatal objection was not even glanced at.

*Sullivan* applied for costs.

MONAHAN, C. J.

This is an application by way of appeal, and this point had not

M. T. 1853.

*Common Pleas*

RODOCANA-

CHI

v.

SODERHOLM.

M. T. 1853. *Common Pleas* been brought forward. Moreover, the question was a very debatable one. It is a rule that where there is an appeal from the decision of one Court to another, the Court will not give costs. The costs of both these motions must be costs in the cause.

RODOCANA-  
CHI  
v.  
SODERHOLM.

M. T. 1854. EYRE v. SPARKS.  
Nov. 6, 8.

On an application to compel the plaintiff to give security for costs, under the 52nd section of the Common Law Procedure Act (16 & 17 Vic., c. 113), it is sufficient if the defendant's affidavit states that he has a good defence on the merits. The affidavit need not state the nature of the defence.

COATES moved that the proceedings in this case should be stayed, until the plaintiff gave security for costs, he being out of the jurisdiction of the Court. The defendant's affidavit, upon which the motion was grounded, stated "that the defendant has a good defence on the merits."

*McFarland*, contra.

The defendant's affidavit is not sufficient; he swears he has a good defence on the merits, but does not say what that defence is. In *Shaw v. Craig*, reported in the note to *Spencer v. Campion* (a), it was held, that an affidavit by the defendant, that he had "a just and valid defence at law upon the merits," was not sufficient.—[BALL, J. The words "at law" do not occur here.]—In a case decided in the Court of Exchequer, in last Easter Term, *Pordage v. Carter* (b), it was held that an affidavit by the defendant, that "he is advised and believes that he has a good defence upon the merits," was not sufficient.

*Coates*.

In *Brindley v. Hemans* (c), the Court of Queen's Bench held that it was not necessary that the defendant should detail the grounds of his defence, in order to come within the terms of the 52nd section

(a) 3 Ir. Com. Law Rep. 231.

(b) 6 Ir. Jur. 236.

(c) 6 Ir. Jur. 164.

of the Act, and that he need only swear generally to merits. In *M. T. 1854. Spencer v. Campion (a)*, the Court was satisfied with an affidavit *Common Pleas* that the defendant "is advised and believes that he has a good and legal defence on the merits." And in *Taylor v. Low (b)*, an affidavit that the defendant had "a just and legal defence upon the merits in this action" was deemed sufficient.

EYRE  
v.  
SPARKS.

MONAHAN, C. J.

The question in this case depends upon the construction of the recent Common Law Procedure Act, regarding which there appears to have been a difference of opinion between the Court of Queen's Bench and the Court of Exchequer. The 52nd section requires that there shall be a "satisfactory affidavit that such defendant has a defence upon the merits." The words of the affidavit here are that the defendant "has a good defence upon the merits." Now, the objection made on the part of the plaintiff to that affidavit is, that it is not "satisfactory," inasmuch as it does not state the nature of the defence. It appears that the defendant has pleaded, but we do not think that that alters the case. The sole question is whether a positive affidavit, sworn by the defendant himself, not by his solicitor or any other person, that he has a good defence on the merits, is a satisfactory affidavit, even though it does not state what the nature of that defence is? We think that, according to the terms of the Act, such an affidavit ought to be held sufficient, and it has been so held in the Court of Queen's Bench, in *Brindley v. Hemans (c)*. The Court there said that they would not try the case upon affidavits, and that if the party swore generally to merits, the Court would hold that sufficient. We think that the ruling of the Court of Queen's Bench was right. Therefore the proceedings here must be stayed until security for costs be given; the costs in this motion to be costs in the cause.

Nov. 9.

Motion granted; costs to be costs in the cause.

(a) 3 Ir. Com. Law Rep. 231.

(b) 3 Ir. Com. Law Rep. 223.

(c) 6 Ir. Jur. 164.

M. T. 1853.  
*Queen's Bench*

GILL v. WILSON.\*

(*Queen's Bench.*)

Nov. 17, 18,  
 21.

A *fiery facias*, having issued against the goods and chattels of A., was lodged with the Sheriff (the defendant), on the 27th of October, and on the 28th the Sheriff seized. On the 29th, two notices were served on defendant by creditors of A., cautioning him against seizing or selling said goods, except on behalf of assignees, to be thereafter appointed in the Court of Bankruptcy. The sale proceeded, and

TRESPASS ON THE CASE.—This was an action brought under the statute 9 *Anne*, c. 2, against the defendant as Sheriff of the city of Dublin, for the seizure of certain goods and chattels under a writ of *fiery facias*, and removing the same off the premises, without satisfying the plaintiff (the landlord of the premises) one year's rent then in arrear and unpaid. The defendant pleaded the general issue.

The case was tried before CRAMPTON, J., at the Sittings after last Trinity Term; and it appeared from the evidence that the plaintiff was the landlord of certain premises held by one James O'Neill; that a *fiery facias* on a judgment obtained in the Court of Common Pleas, on a bond and warrant of attorney, had been lodged with the defendant, as Sheriff, against the said James O'Neill, by one Anne O'Neill, on the 27th of October 1852. Under this writ the Sheriff, on the 28th of October, at twelve o'clock at noon, seized certain goods and chattels lying on the said premises; and on the 29th, two notices were served on him, on during its progress the landlord (plaintiff) claimed a year's rent as due out of the premises occupied by A. The goods were sold, and on the 5th of November a commission of bankruptcy issued, and on the 24th of November an assignee was appointed, who required the defendant to pay him the proceeds of the sale. The Sheriff applied for an interpleader order, and pursuant to its terms he lodged in Court the sum levied. An issue being directed by the Court, between the execution creditor and assignee, the result was that the title of the assignee was established; the landlord (plaintiff) thereupon applied to the Court to direct the money to be paid to him; but this application was refused, and the money was drawn out of Court by the assignee. *Held*, that the Sheriff was liable to an action under the statute of *Anne*, by the landlord, for not paying one year's rent.

*Held also*, that a claim by an assignee of a bankrupt does not displace the landlord's right to distress.

*Held also*, that the goods were not the property of the assignee, because no commission of bankruptcy had issued at the time of the sale.

*Held also*, that the application made to the Court to draw out the money did not affect the plaintiff's right of action.

\* MOORE, J., *absente*.

behalf of the creditors of the said James O'Neill, the defendant in the execution, cautioning the Sheriff against seizing or selling the goods, or paying over any money realised by such sale, to any party but the assignees thereafter to be appointed by the Court of Bankruptcy—such notices alleging that said James O'Neill committed an act of bankruptcy on that day. On the 29th, the sale went on, notwithstanding these notices; and on that day, during the sale, and also on the following day, the plaintiff served on the defendant two several declarations made by him, of one year's rent being due out of the premises occupied by the said James O'Neill, and on which the levy was made. The defendant paid no attention to these notices, and the goods were sold and removed. A commission of bankruptcy issued against O'Neill on the 5th of November following, and an adjudication was made thereon on the 10th of November. A trade assignee was appointed on the 24th, and he on the day following served a notice on the defendant, cautioning him against paying over to any party the amount of the sale. The defendant then applied to the Court of Common Pleas for an interpleader order; and on the 12th of January 1853, that Court made an order directing the defendant to lodge in Court the sum he had levied, notwithstanding the claim of the present plaintiff, without prejudice, however, to any application which he (defendant), or plaintiff as landlord, should make for the payment of said rent out of the money so lodged, and otherwise saving the respective rights of the landlord and the Sheriff; and further ordering an issue to be tried between the execution creditor and the assignee. Pursuant to this order, the defendant lodged in Court the full amount of the sale; and the execution creditor having subsequently abandoned his claim to the money, the assignee of the bankrupt applied to the Court of Common Pleas for liberty to draw the amount out of Court. The plaintiff at the same time applied to be paid one year's rent out of this sum, but the Court refused this latter application, and directed that the full sum lodged should be paid to the assignee, who accordingly drew same out of Court. The amount of rent due by O'Neill was also proved.

M. T. 1853.

*Queen's Bench*

GILL

v.

WILSON.

M. T. 1853.  
*Queen's Bench*  
GILL  
v.  
WILSON.

On behalf of the defendant, evidence was given of the bankruptcy of O'Neill. It was insisted that he had committed an act of bankruptcy before the sale under the execution, by his admission of the petitioning creditor's debt, on the 14th of October, and not paying same within fourteen days, as required by the Bankrupt Act—which fourteen days had expired on the 28th of October, the day before the sale.

It was also insisted, on behalf of the defendant, that as the judgment on foot of which the execution had issued was a voluntary one, and being founded on a bond and warrant of attorney, there should have been a sale as well as a seizure before the act of bankruptcy, to entitle the plaintiff to his claim for his rent, against the goods seized; and that the defendant, being a mere trespasser in seizing and selling the goods, the plaintiff might have distrained for his rent, inasmuch as the act of bankruptcy was committed before the sale took place.

The defendant also gave in evidence the two orders made by the Court of Common Pleas in the interpleader matter, bearing date the 12th and 31st of January, and relied on them as being a sufficient defence to the action, inasmuch as by the former order he was directed to lodge in Court the proceeds of the sale; and by the latter, it was ordered that the money so lodged should be paid to the assignee.

The learned Judge, by consent, directed the jury to find a verdict for the plaintiff, for the amount of one year's rent; same to be turned into a verdict for the defendant, if the Court should be of opinion that, on the whole case, the defendant was entitled to a verdict.

A rule *nisi* having been obtained, pursuant to the leave reserved, *Macdonogh* (with him *Sir C. O'Loghlen*) showed cause.

The plaintiff is entitled to recover in this action; and the objections relied on at the trial are unsustainable:—First, we say the bankruptcy is to be reckoned from the issuing of the fiat, which was subsequent to the seizure, and consequently cannot affect the plaintiff's rights—secondly, assuming that it commenced prior to the

seizure, that will not disentitle the plaintiff to recover—and thirdly, the proceedings under the Interpleader Act cannot affect the plaintiff's rights, he not being a party to them.

M. T. 1853.  
Queen's Bench  
GILL  
v.  
WILSON.

First, then, as to the bankruptcy. The admitting the petitioning creditor's debt, and not paying the same, had not the effect of vesting the property in these goods in the assignee; the property was not divested until the fiat was obtained.

Secondly, assuming that the property vested in the assignee before the seizure, it is to be remembered this is an action brought against the Sheriff, under 9 *Anne*, c. 8 (*Ir.*),\* for removing the goods seized by him under an execution, before the payment of the landlord's rent. The object of the statute was to protect the landlord, and it is no answer to this action that the tenant had committed an act of bankruptcy, prior to the seizure of the goods by the Sheriff. Although the Sheriff might have been liable to an action at the suit of the assignee, that would not affect the landlord's rights: *Duck v. Braddyll* (a). The landlord could not have distrained, as goods when taken in execution are *in custodia legis*, and not liable to distress: *Wharton v. Naylor* (b); and in *Forster v. Cookson* (c), it was held, if a Sheriff under a *fi. fa.* levies

(a) M'Clel. 217; S. C., 13 Pri. 455.

(b) 12 Q. B. 673.

(c) 1 Q. B. 419.

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\* 9 *Anne*, c. 8, s. 1, enacts—"That no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution or foreign attachment, *justicies* or *distringas*, on any pretence whatsoever, unless the party at whose suit the said execution or foreign attachment, *justicies* or *distringas*, issued out before the removal of such goods from off the said premises, by virtue of such foreign attachment, execution or extent, *justicies* or *distringas*, pays to the landlord of the said premises, or his bailiff, all such sum and sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels, by virtue of such foreign attachment, execution, extent, *justicies* or *distringas*, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution or foreign attachment, *justicies* or *distringas* is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment or foreign attachment, *justicies* or *distringas*, as he might have done before the making of this Act; and the Sheriff or other officer is hereby empowered and required to levy and pay to the plaintiffs the moneys so paid for rent."



M. T. 1853.  
*Queen's Bench*  
 GILL  
 v.  
 WILSON.

on and removes goods which are not the property of the judgment debtor, and has notice of rent due before removal, he is liable to the landlord, although he has paid over the whole proceeds of the levy to the owner of the goods. Patteson, J., in that case says, "The landlord might have distrained the goods, to whomsoever they belonged; and the Sheriff, by seizing, has done him all the harm against which the Act meant to protect the landlord." So, no matter when the bankruptcy took place, the landlord could have distrained the goods, had they not been *in custodia legis*. The case of *Gethin v. Wilks* (a) may be relied on as an authority that the landlord might have distrained the goods, but in that case the goods were not *in custodia legis*, as the assignees were in possession, and not the Sheriff, the fiat having preceded the sale. The Sheriff, in the present case, might have withdrawn the execution, and then the landlord could have distrained.

With respect to the order made by the Court of Common Pleas, that does not affect the plaintiff in this cause, he not being party to that order; further, that order was made under mistake, the bankruptcy not being complete until the fiat, which did not take place until after the sale; and an execution, founded on a warrant of attorney, and completed by sale, prior to the issuing of a fiat in bankruptcy, is protected by 7 & 8 Vic., c. 90, s. 36. *Whitmore v. Greene* (b).

*Fitzgibbon and J. E. Walsh, contra.*

The Sheriff was bound to sell these goods, the notice of the landlord's claim not having been given until the sale was actually proceeding. *Gethin v. Wilks* is an express authority in favour of the defendant. The act of bankruptcy having vested the goods in the assignee, and taken them out of the custody of the Sheriff, the landlord might have distrained. In that case, Taunton, J., recognising the authority of *Lee v. Lopes* (c), says:—"In order to entitle the landlord to any part of the proceeds, he ought to have enforced his rights by legal process," or he might have

(a) 2 Dow. 180.

(b) 2 D. & L. 174; S. C., 13 M. & W. 104.

(c) 15 East, 230.

applied to the summary jurisdiction of the Court: *West v. Hedges* (a). Here, the Sheriff was a trespasser, and the goods were not *in custodia legis*, and consequently the landlord might have distrained: *White v. Binstead* (b). It was there held that where a Sheriff seized the goods of A, under an execution against the goods of B, and after the making of an interpleader order, and before the trial of the issue, paid the landlord a quarter's rent, that the Sheriff was bound to pay over the amount of the quarter's rent, as well as the rest of the proceeds of the sale, to A, after the decision of the issue in his favour. The cases of *Foster v. Cookson* and *Duck v. Braddyl* are not in point: in the latter case the Sheriff retained the rent, setting up the *jus tertii*; and the observation relied on in the former case is a mere *dictum*, the true construction being that given to the statute by Lord Ellenborough, in *Lee v. Lopes*. The intention of the statute was to exclude any question as to the nature of the goods, not as to the ownership; for it uses the words, "any goods whatsoever;" and further, the enactment is confined to executions under attachments, showing that it must be a legal execution, and not a trespass.—[LEFROY, C. J. If the Legislature meant to deal with the goods only of the person liable to the execution, why use the words, "on any pretence?"—CRAMPTON, J. If you read the Act as if the words were that the goods seized must be the goods of the defendant in the execution, it might happen that the seizure was made under a foreign attachment, and the case may be one in which a foreign attachment will not lie, yet the Sheriff will be liable in such a case.]—*Balme v. Hutton* (c). If the seizure were wrongful, the Sheriff would be liable in trover at the suit of the assignees.—[PERRIN, J. I conceive that the Sheriff, acting *bonâ fide* by virtue of the execution, is not bound to do any thing until the landlord is paid his rent.—LEFROY, C. J. The Legislature appear to have passed the statute, not with a view to determine the liability to take or remove the goods, but to secure the right of the landlord which he had before the execution,

M. T. 1853.  
Queen's Bench  
GILL  
v.  
WILSON.

(a) Bar. 211.

(b) 22 Law Jour., N. S., 115, C. B.

(c) 3 M. &amp; Sc. 42.

M. T. 1858.  
*Queen's Bench*  
 GILL  
 v.  
 WILSON.

namely, the right of distress.]—We say these goods were vested in the assignee by relation. The 6 *W.* 4, c. 14, s. 126, provides that no creditor of a bankrupt, having security for his debt, shall receive upon such security more than a rateable part, except on an execution served and levied by seizure before the bankruptcy. The 7 & 8 *Vic.*, c. 90, s. 36, protects an execution under an adverse judgment, if executed by seizure after the bankruptcy, but without notice of the bankruptcy; but under that section, an execution on a judgment recovered by warrant of attorney is not protected: *Whitmore v. Robinson* (a); *Godson v. Sanctuary* (b). The protection could not apply to non-adverse cases, as it did not require a prior act of bankruptcy to affect them, they being equally affected by one intervening between the seizure and the sale. Here, the act of bankruptcy was complete on the 28th of October, being the 15th day after the issuing of the summons under 12 & 13 *Vic.*, c. 107, s. 20; and the notice of that to the plaintiff deprived him of the benefit he might claim under 7 & 8 *Vic.*, c. 90.

With respect to the question under the Interpleader Act—the plaintiff, although not a party to the order that was made, had a reservation of his right to come in under that order, and he acted on that reservation; and the Court having made an order on the Sheriff to bring in the money, the Sheriff was thereby protected, for that was a submission by all parties, and therefore removes the plaintiff's right of action.—[LEFROY, C. J. That would amount to nothing but a judgment of nonsuit—it would be no bar to another action.]

Sir C. O'Loughlan, in reply, cited *Henchet v. Kimpson* (c); *Cocker v. Musgrove* (d); *Furl. Land. & Ten.*, p. 772; *Taylor v. Lanyon* (e); *Ex parte Plummer* (f); *Taylor v. Taylor* (g); *Skry v. Carter* (h).

*Cur. ad. vult.*

(a) 8 M. & W. 463.

(c) 2 Will. 140.

(e) 6 Bing. 536.

(g) 5 B. & C. 392.

(b) 4 B. & Ad. 255.

(d) 9 Q. B. 223.

(f) 1 Ad. 108.

(h) 11 M. & W. 571.

LEFROY, C. J.

M. T. 1853.

*Queen's Bench*

GILL

v.

WILSON.

This was an action brought against a Sheriff by a landlord, for a breach of duty in having removed goods taken under an execution off the premises, after notice of the claim of the plaintiff to a year's rent. The facts necessary to be stated are very few. It is admitted that the Sheriff had notice of the landlord's claim—that he had seized and sold the goods under an execution delivered to him—that a claim having been made by the assignees of the defendant in the execution, who, it was alleged, had committed an act of bankruptcy, which would override the execution, the Sheriff applied to the Court of Common Pleas for an interpleader order; and that an issue was accordingly directed between the claimant and the defendant in the execution—the result of which was, that the title of the assignee was established. The Court of Common Pleas, on an application by the landlord, made an order that the fund should be handed over to the assignees, and refused to pay the landlord his year's rent out of that fund.

The principal question now is, whether the landlord, having failed in that application, is entitled to maintain this action against the Sheriff? Three matters have been argued upon the discussion of this case:—The first arises upon the construction of the statute 9 *Anne*, c. 8; the second, upon the validity of the claim of the assignee; and the third, upon the effect of the interpleader order. It might not, perhaps, be necessary to express an opinion upon each of these points; but as I have arrived at a definite conclusion upon each, I shall state my views.

Upon the first question, I shall not occupy time by repeating the words of the statute, because an exposition of it is so clearly given by Lord Ellenborough, in the case of *Henchett v. Kimpson* (a). He says:—"Neither a plaintiff or defendant have any right to go upon the premises; the law gives this entry to the Sheriff only, by virtue of the execution; but after he has had notice of rent being due to the landlord, he cannot remove the goods till he has satisfied the landlord one year's rent; the landlord shall

(a) 2 Wilson, 140.

M. T. 1853.

Queen's Bench

GILL

v.

WILSON.

"have the like benefit of distress for one year's rent, as if there had been no execution at all. Unless the rent be paid, the Sheriff must quit; and if he does not quit, a special action on the case lies against him, after notice of the rent due." The law there laid down has never been altered or questioned. If the Sheriff had discharged his duty, what would have resulted? The plaintiff in the execution had notice of the landlord's claim, and the Sheriff had nothing to do but call on him to pay the landlord's rent; and if he did not do so, the Sheriff ought to have withdrawn the execution, and make a return of *nulla bona*; for the statute declares that no goods or chattels whatsoever, lying or being upon any messuage, liable to execution, shall be removed, unless the plaintiff in the execution pay the claim of the landlord.

Suppose the assignee had a good title to the goods on the premises—be that title ever so good—even if the messenger of the Bankrupt Court were in possession of the goods, and there was the most perfect fiat of bankruptcy—yet, according to authority, the landlord's right to distrain was not displaced, because, although an execution on a judgment puts the goods in *custodia legis*, the execution in bankruptcy does not shut out the landlord; but the Sheriff, by carrying through the execution, and selling the goods, and not securing the landlord payment of his rent, thereby deprived him of the right he had against all the world to have distrained and secured his rent.

But it is said the Sheriff was a wrong-doer, as between him and the assignee, in having seized and sold the goods of the assignee. That may or may not be so; but he cannot, by incurring a liability to the assignee, thereby divest himself of liability to the landlord; and this is but an argument *ad misericordiam*. Then it is said that there is a *dictum* of Lord Ellenborough, in the case of *Lee v. Lopes*, contravening this view of the law. That was a case to which the statute of *Anne* did not apply. There the landlord seized under an execution against his own tenant, and he could not be heard saying that he (the exe-

cution creditor) ought to be protected against himself. There, by his own act, putting the goods *in custodia legis*, he suspended his own remedy as landlord. Lord Ellenborough says, that as between the landlord and the assignee, the Sheriff was a wrong-doer as against the assignee; and in bankruptcy, it is a settled rule, that a landlord, to avail himself of the right to be paid rent, cannot merely claim under the statute, but he must make an actual distress: it is absurd therefore to talk of the Sheriff being a mere wrong-doer. He advertised the goods for sale. Did he do that as a wrong-doer, or as Sheriff? He applied to the Court of Common Pleas for protection under the Interpleader Act—that was not done as a wrong-doer. He could not come in under that Act, and say I did this as a wrong-doer. My Brother PERRIN has referred to 1 *Wm. Saund.*, p. 23, a (note to *Bennett v. Firkins*), where it said, “It is now settled, that a *virtute cujus*, where it is mixed “with matter of fact, and does not put in issue a mere conclusion “of law, is traversable; thus, if in an action of trespass the defendant pleads in justification a seizure of goods, as Sheriff, by “virtue of a writ of *fi. fa.*, the allegation of the seizure of the “goods by virtue of the writ is not a matter of law, but of fact, “and is therefore traversable. And by a replication to such a plea, “admitting the writ, and adding *de injuria absque residuo causa*, “the plaintiff may raise the question of fact, whether the Sheriff “seized by virtue of the writ or not; and may show, under that “traverse, that the acts of the defendant were not really done under or in execution of the writ, but for another purpose, under “another claim; and that the writ, and the proceedings under it, “were a mere colour and contrivance to get possession of the “goods.” I will assume the Sheriff seizes the goods of a stranger, and that a claim is made by that stranger; his responsibility to that stranger does not exempt him from the claim of the landlord, because, let the goods belong to whom they may, the Sheriff has protection as between him and the claimant under the statute; and for this purpose, can get an issue to ascertain the right of the latter; or he may, *quoad* the landlord, with-

M. T. 1853.  
*Queen's Bench*  
 GILL  
 v.  
 WILSON.

M. T. 1853. draw the execution altogether, and the landlord then may distrain, and get his rent.

*Queen's Bench*

GILL  
v.

WILSON.

With regard to the second point, there was no such misfeasance as I have before mentioned, because the goods were not shown to have been the property of the assignee, as no commission of bankruptcy had issued at the date of the sale.

Upon the third point, I am of opinion that the matter before the Court of Common Pleas was not a proceeding *ad idem* with the present. The application to that Court was, that the landlord's rent should be paid out of the proceeds of the sale; and the Court of Common Pleas assumed that a commission of bankruptcy had issued, and that the right to the goods belonged to the assignee; and although the landlord might have distrained the goods on the premises, yet, as against the proceeds of the sale in the hands of the Sheriff, he was bound to come in *pro rata* with the other creditors; but here the case is different altogether, for the assignee had no title to the goods.

I therefore am of opinion that judgment ought to be given for the plaintiff.

CRAMPTON, J.

I concur with my LORD CHIEF JUSTICE. The situation of the Sheriff, in whose hands a writ of execution is placed, is often a difficult one, and involving great responsibility; therefore, every consideration is to be given to an officer acting *bona fide*; and though he will be protected while acting under the writ, he should be compelled to follow the prescribed line of duty.

Now, this is not an action at Common Law; it is an action founded on the statute of 9 *Anne*, whereby the Sheriff becomes liable, in a certain event, to the landlord; but he has ample means to protect himself against this statutable liability. The statute says that the Sheriff shall not remove the goods until the plaintiff in the execution shall satisfy the landlord the amount of one year's rent. In this case, notice was duly given to the Sheriff, and

thereupon a direct liability was cast on him. The statute directs that he shall not sell until the landlord is satisfied his rent. Why did he not observe that direction? His duty was to call on the execution creditor to pay the landlord's rent. He did not do so, and became a defaulter the moment the goods were sold. The landlord's remedy was intercepted by the act of the Sheriff. The statute says the goods and chattels lying on the premises are subject to the landlord's rent; his rent was not paid, but the Sheriff sells the goods, and the right of action in the landlord immediately accrues.

M. T. 1853.  
*Queen's Bench*  
 GILL  
 v.  
 WILSON.

How is this encountered? It is said that the property seized was not the property of the tenant, but of a third person (the assignee), and that the statute only gives the landlord the right in a case in which the property is the actual property of his tenant. That is not the true construction of the Act. That defence involves two propositions—one, a matter of fact—another, a matter of law. In point of fact, the defendant ought to have shown that the property vested in the assignee of the bankrupt, at the time in question. Now, it is plain, the title of the assignee was not complete as against this execution, until the 5th of November, whereas the execution was laid on the 28th of October; therefore, that defence fails. Then the other question arises. Supposing that he had made out that the assignees were entitled to the property upon the day of the sale, that defence would equally fail, because the Sheriff is not to sell without seeing the landlord satisfied.

Then another defence has been raised, of a totally different nature. The Sheriff had a plain course to pursue, by saying to the execution creditor, "pay the landlord's rent, or I will withdraw the execution." He omitted to take this course, but he had also another course. Before selling the goods, he might have applied for an interpleader order; and instead of doing so, he takes upon himself the responsibility, and sells. After the sale, he applied for an interpleader order; he obtains that order, the Court reserving to the landlord a right to come in, pending the result of the action. No



M. T. 1853.

*Queen's Bench*

GILL

v.

WILSON.

action was brought; but if it had been tried, the right of the plaintiff would have been established. The Court of Common Pleas made a very proper order, because in the event of the execution creditor succeeding, the landlord would have been entitled to have been paid out of the levy; for by the Interpleader Act, the Court is empowered to direct how the money shall be applied. Every person's rights were protected, and the Sheriff was placed in a proper position. That Court did not, however, decide that the landlord was entitled to the rent, because the interpleader issue may have been determined in favour of the assignee; they therefore could not say he should be paid out of the property of a person who owed him nothing. On the first motion before the Court of Common Pleas, the landlord was not bound to appear, and it appears that in the interval the parties settled with each other, and I may say collusively; and the question was not then raised, but it came again before the Court, upon the conceded fact that the goods were the property of the assignees, and not of the plaintiff in the execution; and they then acted on the well-known principle of law, that a stranger cannot be made answerable for the rent of another party, except through the medium of a distress. That Court could not, therefore, consistently have made any other order. Then we have the strong words of the Interpleader Act, making this order tantamount to a judgment. Under such circumstances, the landlord could get no relief; by going into Court under that order, he went on the assumption that the goods were the property of the assignee; and as he could not get relief from the assignee, he was entitled to revert to his original right against the Sheriff. The true construction of the Act is this:—Whenever goods, whether the goods of the owner or of a stranger, are on premises subject to a distress, the landlord is entitled to payment, from the execution creditor, of one year's rent; and if he does not pay, the Sheriff's duty ceases. The landlord has a lien for his rent on the produce of the sale, if the goods sold be the property of his tenant, but not if the goods be the property of a stranger. It is therefore clear, that there is nothing to intercept the landlord's right to maintain this action.

PERRIN, J.

I concur in the judgment of the Court. The words of the statute are clear and plain. A *dictum* has been cited from the case of *Lee v. Lopes*, with a view to raise a conflict of authority. There, however, the landlord made the levy; and it would be absurd to say that he, the moving party, should tell the Sheriff not to pay him the full amount of his execution. He did not distrain while the goods were on the premises; and the observation there made was not intended to dispute the clear construction of the statute. I see no conflict with the other authorities in that case.

As to the claim of the assignees of the bankrupt, the seizure made was within the provisions of the statute; however that may be, it is plain the landlord was injured to the same extent, whether the writ was regular or irregular.

With respect to the interpleader order, the landlord was no party to it; and although he applied to be paid his rent, he did not thereby deprive himself of the right to proceed under the statute of *Anne*.

Cause allowed, with costs.

M. T. 1853.

*Queen's Bench*GILL  
v.

WILSON.

LALLY, in replevin, v. CONCANNON.

May 3.

REFLEVIN, brought against a poor-rate collector, for a distress made by him upon premises of which the defendant was in possession as a subsequent occupier. The avowry stated that a rate of five

An estate was sold in the Incumbered Estates Court, and the statute 12 & 13 Vic.,

c. 77, declares that the purchaser of such sold estate shall hold the same discharged "from all rights, titles, charges and incumbrances whatsoever," &c. At the time of the sale, there were arrears of poor-rate due out of some of the denominations sold.

*Held*, that the purchaser was liable for such arrears, and that the lands might be distrained on for same; the poor-rate not being a charge within the terms of the section.

E. T. 1853.  
*Queen's Bench*  
 LALLY  
 v.  
 CONCANNON

shillings in the pound had been made on the premises on the 27th of November 1850, R. B. Foster being rated as occupier; that on the 17th of September 1851, another rate was made, R. B. Foster being the occupier; and that after the said rates had been made, the defendant became the occupier. The distress was made in August 1852. The plaintiff, among other pleas, pleaded that, after the rates were respectively made, and whilst R. B. Foster continued in occupation, the Commissioners of Incumbered Estates duly conveyed to James Thorngate and others the fee-simple and inheritance of the premises, discharged from all charges and incumbrances; that after the execution of the conveyance, the purchasers entered, and afterwards demised the premises to the plaintiff, who, as such tenant, entered and continued in possession. The defendant replied that the plaintiff was the occupier in the manner stated in the avowry.

On the trial of the case before TORRENS, J., at the last Assizes for the county of Galway, there was given in evidence the deed of conveyance by the Commissioners of Incumbered Estates (bearing date the 30th of July 1852), to J. Thorngate and others, and the demise by the latter to the plaintiff. The plaintiff also gave in evidence the schedule of incumbrances lodged for the purpose of distribution of the purchase-money, dated 10th of February 1852, in which a claim of the Guardians of the Tuam Union appeared for poor-rate on said premises; and there was an entry of payment on foot of said claim, of £61 for arrears of poor-rate due out of the premises sold; and an order of the Commissioners, dated 25th of May 1852, was read, directing this sum to be paid to the Guardians for unpaid arrears of poor-rate due out of that part of the lands sold, which were rated under £4, and unoccupied. The receipt of the chairman of the union for this sum, dated 30th of May 1852, for unpaid arrears due on lands rated under £4, and the rental under which the premises were sold, were then given in evidence—in this rental these premises were returned as unoccupied.

Counsel for the plaintiff called for a direction, on the ground that it appeared, by the order of the Incumbered Estates Court, that the premises on which the rate was claimed formed one of the

tenements for which the £61 were paid. The learned Judge was of opinion that the receipt only applied to tenements which were both unoccupied, and also rated under £4, and not to such as were unoccupied, but rated over £4.

E. T. 1853.  
*Queen's Bench*  
 LALLY  
 v.  
 CONCANNON

They also called for a direction, on the ground that the conveyance from the Incumbered Estates Commissioners passed the lands freed and discharged from all charges and incumbrances: this the learned Judge refused, but directed a verdict for the defendant, with liberty to have the verdict set aside, and a verdict entered for the plaintiff, if the Court were of opinion he was wrong in that direction. A rule *nisi* having been obtained, in pursuance of the leave reserved—

*Fitzgibbon* (with him *Concannon*) showed cause.

The single question is, does a purchaser under the Incumbered Estates Court take the lands discharged from arrears of poor-rate? The 27th section of 12 & 13 *Vic.*, c. 77 (Incumbered Estates Act), does not apply to a charge of this description; *In re Robins* (a); it says:—"Every such conveyance or assignment executed by the Commissioners, &c., shall be effectual to pass the estate, &c., discharged from all rights, titles, charges and incumbrances whatsoever, affecting the leasehold estate or interest," &c. This is a charge of a public nature, and the words used in that section only apply to charges created by contract. The 78th section of the Poor-law Act authorises the Guardians to levy the rate by distress on rateable premises, and the Poor-law collector had power to distrain any thing he found on the premises, irrespective of the ownership of the land; and the conveyance from the Commissioners did not discharge the purchaser from the payment of the arrears of poor-rate. With respect to the question, as to whether the arrears have been discharged by the order of the Commissioners; that order merely reserved a sum of money to be applied in the discharge of rates on lands rated under £4 and unoccupied, excluding all such as were rated over that amount: but even supposing the order bore the construction contended for, and applied as well to lands unoccupied as to those both unoccupied and rated

(a) 4 Ir. Jur. 145.

E. T. 1853.  
*Queen's Bench*  
 LALLY  
*v.*  
 CONCANNON

under £4, the money was not paid with that view, and cannot now bind the parties; especially, the purchaser was a stranger to the order of the Court.

*R. C. Walker and C. Andrews, contra.*

The purchaser, Thorngate, under whom the plaintiff claimed, and from whom he derived as lessee, took a title under the deed from the Commissioners of Incumbered Estates, discharged of the arrear of poor-rate for which this distress was made, and the Guardians of the Poor were actually paid the poor-rate avowed for out of the purchase-money of the estate by the payment of the £61, under the order of the Commissioners. The 12 & 13 *Vic.*, c. 77, s. 27, passes the fee-simple in the lands, subject only to such leases and tenancies as are referred to in the schedule to the deed, discharged from all former and other estates, rights, titles, charges and incumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whatsoever.—[LEFROY, C. J. No issue has been knit on the effect of the conveyance.]—The issue is on the allegation that Lally became a tenant under Thorngate, of the lands, discharged from poor-rate arrears.—[MOORE, J. It does not seem to me to come within the issue on the pleadings; but as the parties have taken this course at the trial, I do not know that we are to object to it.]—The subject matter of poor-rate, as recoverable by distress on the lands, comes properly within the words and intention of the Act of 12 & 13 *Vic.*, c. 77, s. 27, as a right or charge on the lands. The words of the Act are comprehensive enough, and the intention may be presumed to be to cover so extensive a liability as arrears of poor-rate, so far as the same would constitute a liability on the purchaser under the statute. The lands on which the distress was made were rated for the rates in question as on an owner or occupier, and by the parliamentary deed were conveyed to Thorngate as premises unoccupied, and the possession thereof conveyed to him by the deed. It is therefore argued on the other side that, notwithstanding the conveyance, Thorngate became immediately liable to distress for the arrears, through the taking possession under the deed. By the 78th section of 1 & 2

*Vic.*, c. 56, the purchaser's liability would also remain, in case of leasing the lands, for the tenant has a right to be indemnified by the landlord against any distress for arrears. Poor-rate is as much a charge as any rentcharge. It is not necessary to consider the case of conveyances subject to leases, when the arrear would properly be a charge on such tenants thereunder, and not charges on the purchaser. The case *In re Robins' Estate* does not govern this case, as there any claim for labour-rate had not arisen, or was not ascertained as a specific charge at the time of the parliamentary conveyance, but was to depend on some future presentment by a grand jury of a portion of a general baronial liability.

E. T. 1853.  
*Queen's Bench*  
 LALLY  
 v.  
 CONCANNON

Further, the £61 paid to the Guardians, under order of the Commissioners of the Incumbered Estates Court, must be taken to have included the arrear of poor-rate distrained for. The demand, as against the lands sold, must be against the purchaser, as he took the premises under the statutable conveyance as unoccupied, and the possession to be given. The claim the Guardians made in the Incumbered Estates Court related to such arrears, as well as such as were due in respect of premises rated under £4. The orders of the Court apply to both characters of claim. The argument of the other side is, that the receipt taken by the Guardians was for £61, for arrears on tenements rated under £4, and unoccupied; but it must be read, to make it intelligible, as applied to unoccupied premises, as well as those rated under £4. Such construction is in conformity with the orders, and necessary to carry out the intention, as otherwise the term "unoccupied" would, as regards the £4 rating, be inapplicable, as such rates fall on the owner, whether occupied or unoccupied, and would not include the rates on unoccupied tenements generally.

LEFROY, C. J.

Assuming it was open to the plaintiff to rely on the points argued, we are of opinion that both should be ruled against him. But if the pleadings were carefully scanned and examined, it might be found that these points were not open to him. The first point was, as to the rate being for unoccupied lands, that is, the lands on which the distress was made: we are of opinion the

E. T. 1853.  
*Queen's Bench*  
 LALLY  
 v.  
 CONCANNON.

evidence does not support the allegation of an actual payment of this rate for those lands; we decide not upon the subsequent acts, but on the receipt, which is the act of both parties at the time of payment. A claim was made for rates on land, rated under £4, and *unoccupied*, but when the money is paid by those liable, a receipt is given for "unpaid arrears, due on lands rated under £4." Is not that evidence that the rate was paid on that account exclusively, and not on the unoccupied lands?

As to the second question, whether or not the conveyance from the Incumbered Estates Court releases the lands from arrears of poor-rate? It might be sufficient to say that this was decided in substance on an appeal before the Privy Council, upon the question of the labour-rate: *In re Robins' Estate*. But the Incumbered Estates Court Act enacts "that every such conveyance, executed "as aforesaid by the Commissioners upon the sale of land, shall "be effectual to pass the fee-simple and inheritance of the land "thereby expressed to be conveyed, subject to such tenancies, leases "and under-leases as shall be expressed or referred to therein "as aforesaid, but save as aforesaid, and as hereinafter provided, "discharged from all former and other estates, rights, titles, charges "and incumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whomsoever," &c. It is plain that the words "rights, titles" cannot embrace poor-rate, and the only word under which it could be argued to come would be "charges;" but when we consider the Poor-law Act, and that thereby there is imposed a liability on land, yet that liability is not a charge, such as Courts are conversant with. The Poor-law Guardians could not file a petition to sell the lands for arrears of poor-rate as a charge. The Poor-law Act itself does not make the rate a charge. The rate thereby imposed is to be made on the occupier of a rateable hereditament, that is, land liable to be charged, but the land itself is not charged; and further, there is a substantive section, making the occupier liable, if the previous occupier had not paid the rate. Now, if the lands were charged, there would be no necessity for the subsequent section, making the subsequent occupier liable, for he must take it *cum onere*. Upon both points, therefore, the case must be ruled against the plaintiff.

MOORE, J.

E. T. 1853.

*Queen's Bench*

LALLY

v.

CONCANNON

I entertain great doubts whether the points were properly raised on the pleadings. The correct course would have been to have cravedoyer of the purchase-deed, and pleaded; but assuming the question open as to the operation of the Incumbered Estates Act, I am clearly of opinion it never was the intention of the Legislature, nor is it the effect of the statute 12 & 13 *Vic.*, c. 77, to discharge the purchaser from the payment of poor-rate, or of any public demand of that nature. The decision of the Privy Council, *In re Robins' Estate*, is exactly in point.

With regard to the other question, it is impossible to say it could be raised on the pleadings; however we have heard it argued, and I fully concur in the view taken by my LORD CHIEF JUSTICE, as to the effect of the receipt.

Cause allowed, with costs.\*

\* CRAMPTON and FERRIN, J.J., were absent.

## COPPINGER v. SYNNOTT.

Nov. 14.

**ASSUMPSIT**, for work and labour done by the plaintiff, as attorney and solicitor for the defendant.—Plea, the general issue. On the trial, the plaintiff claimed the amount of two bills of costs—one for law business, and the defence to that demand was, that the business was useless; and upon that issue the jury found for the defendant. The second bill of costs was for business done in conducting a Chancery cause. The defence relied on, as to this claim, was that the Chancery cause was still pending and undetermined. It was a redemption suit, in which Synnott was plaintiff; and there had been a decree to account, and several proceedings had been taken in the Master's office under the decree. The cause had been set down for final hearing since the commencement of this action, and had not been heard when this action was at trial. The plaintiff was still acting as solicitor for Synnott in the Chancery cause. Upon this

An attorney retained for the conduct of a Chancery suit, and accepting such retainer, thereby enters into a specific contract to carry on the proceedings, and cannot, without due notice, and before the suit is terminated, rescind that contract, and sue on a *quantum meruit*.



M. T. 1858.  
*Queen's Bench*  
 COPPINGER  
 v.  
 SYNNOTT.

state of facts, Counsel for the defendant insisted that the action for the latter bill of costs was not maintainable, and called upon the Judge to direct the jury accordingly. His Lordship left it to the jury to say whether the work was done, reserving liberty to the defendant to move to enter a verdict for him, or a nonsuit, if, under the circumstances, the Court should hold the action not to be maintainable; and the jury found for the plaintiff on this demand.

*J. E. Walsh*, having obtained a conditional order, according to the leave reserved—

*Macdonogh* (with him *O'Hagan*) now showed cause.

Two essential elements here are wanting, to show the plaintiff disentitled to recover:—First, it should have been proved that the plaintiff had abandoned the cause; secondly, that injury had resulted to the defendant, in consequence of such abandonment: *Ross v. Earl* (a). That case decides that an attorney is not bound to proceed, if no injury result to the client. *Vansandan v. Brown* (b). It was there held that an attorney could not be compelled to proceed to the end of a suit, in order to entitle him to his costs.—[*CRAMP- TON, J.* Have you any authority to show, that while the cause is proceeding, an attorney may split his right of action into several parts?]  
 —None, save the inference to be drawn from those cited: 2 *Sm., L. C.*, 11.

*J. E. Walsh*, contra.

An attorney is entitled, on giving due notice to his client, to rescind the contract, and sue on a *quantum meruit*; and that was the ground relied on in these cases cited; but here, the contract was not rescinded, and the only question is, was there an existing contract? *Harris v. Osborne* (c). Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination; it is determinable by the attorney only on reasonable notice: *Nicholls v. Wilson* (d); *Whitehead v. Lord* (e).

(a) *M. & Mal.* 538.

(b) 9 *Bing.* 402.

(c) 2 *Cr. & M.* 629.

(d) 11 *M. & W.* 106.

(e) 7 *Ex.* 691.

*O'Hagan*, in reply.

The contract was to do the work from time to time; and there is no contract to do the work for a specific sum.

M. T. 1853.  
*Queen's Bench*  
COPPINGER  
v.  
SYNNOTT.

LEFROY, C. J.

The contract was an entire contract *prima facie*; but it may be waived, and the Court may make an order to discharge the attorney, and then he may bring his action. This was a contract to do certain work, on a *quantum meruit*; and that is a specific contract.

Nonsuit entered.

### KINAHAN v. MALYN.

Nov. 14, 15.

CASE.—The declaration stated that the defendant had sued out of the Court of Common Pleas a writ of *capias ad satisfaciendum*, against one Thomas De Wilton, directed to the Sheriff of the city of Dublin, commanding him to take the said Thomas De Wilton, according to the exigency of said writ, in execution, for a debt of £150, recovered by the defendant, and £17 damages. That the defendant duly caused said writ to be delivered to the plaintiff, as such Sheriff. That the plaintiff, as such Sheriff, arrested

A writ of *ca. sa.* was lodged with the Sheriff, who arrested T. W. instead of H. W., the real debtor. Having him in custody, he took him to the establishment of the defendant (the plaintiff in the execution), who, being from home, his foreman, in answer to an inquiry from the Sheriff's bailiff, told him T. W. was the real defendant. Thereupon the Sheriff conveyed T. W. to the marshalsea; and afterwards, an application being made to discharge T. W. from custody, at the defendant's request, the motion for the discharge of T. W. was deferred until the following day, when defendant, having discovered his mistake, notified to the Sheriff that the wrong person was in custody; and the Court discharged T. W., who then brought an action against the Sheriff for false imprisonment, and judgment having gone by default, damages were assessed and paid by the Sheriff. The Sheriff then brought an action against the defendant, alleging a false and wilful representation by the foreman of the defendant, whereby he was induced to detain T. W. in custody. *Held*, there was no evidence to connect the defendant with the representation of his foreman, and that such representation was not false or wilful, inasmuch as it was made in answer to the Sheriff's inquiries, and when made, was believed to be true.

M. T. 1853.  
*Queen's Bench*  
KINAHAN  
v.  
MALYN.

one Henry De Wilton, as and in mistake for Thomas De Wilton, and under the supposed authority of the said writ, and believing him to be the said Thomas De Wilton. That Henry De Wilton was for a short time, to wit, ten minutes, in such custody of the plaintiff; and before he was conveyed to prison by the plaintiff, Henry De Wilton alleged to plaintiff that he was not Thomas De Wilton, named in the writ; and thereupon plaintiff was about to discharge, and would then and there have discharged, Henry De Wilton from the said arrest; yet, the defendant well knowing, &c., for the purpose of preventing the plaintiff discharging Henry De Wilton from his custody, which the plaintiff was about to do, and would otherwise have done, and to cause Henry De Wilton to be conveyed and committed to prison by the plaintiff, under the supposed authority of said writ, he (the defendant), wilfully, falsely and negligently, represented and declared to the plaintiff, so being such Sheriff, that Henry De Wilton, who was so arrested by the plaintiff, and was then in the plaintiff's custody, was Thomas De Wilton, against whom the writ at the suit of the defendant had so issued, and required the plaintiff, so being such Sheriff, to keep and detain Henry De Wilton; and the defendant, by so falsely representing, &c., and by directing and requiring the plaintiff to keep and detain Henry De Wilton, under the supposed authority of the said writ, for the space of six days, until the discharge of Henry De Wilton, caused and induced the plaintiff, as such Sheriff, to keep and detain Henry De Wilton in the plaintiff's custody, as such Sheriff, under the said supposed authority of said writ; and the plaintiff being, during all that time, ignorant that Henry De Wilton was not the person against whom the writ had issued, but on the contrary, confiding in the aforesaid false representation and declaration of the defendant, and believing same to be true, did, by reason and means of said false representation, keep and detain Henry De Wilton in his custody, as such Sheriff, under the said supposed authority, in the Four-Courts Marshalsea prison, for a long time, after the plaintiff was about to discharge, and would have discharged, him from custody, to wit, from the making of such false representation, for six days,

until he was discharged by order of the Court of Common Pleas, by reason whereof Henry De Wilton sued plaintiff, both for the prior and subsequent detention, so occasioned by the false representation of the defendant, and the costs of Henry De Wilton, occasioned thereby; and obtained a verdict and judgment against the plaintiff for damages and costs, amounting to £98, which plaintiff paid, and that plaintiffs thereby incurred costs in such action, amounting to £65.

M. T. 1853.  
*Queen's Bench*  
KINAHAN  
v.  
MALYN.

The second count varied from the first, by alleging that the defendant wilfully, &c., caused and procured one James Boon falsely to represent and declare to the plaintiff that the said James Boon was well acquainted with the person of Thomas De Wilton, and that Henry De Wilton, who was arrested, was said Thomas De Wilton. Plea—not guilty.

The case was tried at the Sittings after Trinity Term, before CRAMPTON, J. It appeared, in evidence, that the plaintiff, in the year 1851, was High-sheriff of the city of Dublin, and the defendant was a partner in the firm of Buckmaster & Co., Tailors. This firm, having a judgment against Thomas De Wilton, then quartered with his regiment in Dublin, caused a writ of *capias ad satisfaciendum* to be issued, and delivered to the Sheriff for execution. The Sheriff accordingly issued his warrant to his bailiff to arrest Thomas De Wilton. On the 7th. of November 1851, the bailiff arrested Henry De Wilton, in mistake for Thomas, who was his brother, and having detained him for a short time, conveyed him in a covered car to the place of business of defendant, for the purpose of identification. The defendant was then absent; but James Boon, the foreman of the defendant, upon the refusal of Henry De Wilton to leave the car, went out of the shop, at the request of the bailiff, to the car, and there, by the light of a match, said he was able to identify Henry De Wilton as the defendant in execution. Henry De Wilton did not at that time deny his identity, but said nothing. He was then taken to the Marshalsea, and shortly after, the bailiff returned to Boon, and brought Boon to the Marshalsea, in order to be satisfied of the identity of the pri-

M. T. 1853.  
*Queen's Bench*  
KINAHAN  
v.  
MALYN.

soner. Boon, having again seen Henry De Wilton, informed the bailiff that he believed he was the right man, but was not quite sure about it. Boon subsequently expressed to the defendant some doubt as to the identity of the prisoner. The defendant was not in his place of business at all when the bailiff brought the prisoner to be identified; and it did not appear that he interfered, or authorised his servants to make any statements whatever to the bailiff. On the following day, the Sheriff apprised the defendant that he feared the wrong person had been arrested, and that he was ready to discharge him, with the defendant's assent. The defendant refused to interfere, or to send Boon again to the Marshalsea, believing that the proper person had been arrested; also, that if there had been a mistake, he ought not to interfere any further in the matter, but allow the responsibility to rest on the Sheriff; which refusal was communicated to the bailiff. Upon the evening of the 11th of November, a notice was served on the defendant, that an application would be made the following morning, at the sitting of the Court of Common Pleas, for the prisoner's discharge, which motion was adjourned until the following day, at the request of the defendant. In the interval, Boon went to the Marshalsea, and there ascertained his error, with regard to the supposed identity. A note was then written by the defendant's attorney to the Sheriff, informing him that a wrong person had been arrested, and that he considered the Sheriff ought to discharge him out of custody. In reply to this, the Sheriff wrote, offering to discharge the prisoner, on receipt of a written discharge or direction from the defendant, to which the defendant gave no reply. The motion for the discharge was moved on the 13th of November, when, after hearing Counsel on both sides, the prisoner was discharged, and the defendant directed to pay the costs of the motion. Henry De Wilton thereupon brought an action against the Sheriff, and recovered £50 damages and 6d. costs; and for the loss occasioned thereby, the present action was brought.

On the close of the plaintiff's case, Counsel for the defendant called for a nonsuit, on the ground that there was no duty cast

upon the defendant to identify the party arrested, or in any way to interfere in the execution of the writ; and secondly, that there was no evidence of any authority given by the defendant, express or implied, to Boon, from the nature of his employment, to make any of those statements proved as to the identity of the prisoner, or at all to interfere in the execution of the writ. The learned Judge refused to nonsuit, but reserved the points.

M. T. 1853.  
*Queen's Bench*  
 KINAHAN  
 v.  
 MALYN.

For the defence, the defendant was examined, and deposed that he had never given any authority to Boon, or any person in his employment, to interfere, or make any statement to the bailiff, and that whatever was said or done by him in relation to the declaration or arrest was without his consent or knowledge; that he did not send or authorise Boon to go to the Marshalsea to see the prisoner; and that he did not interfere at all in the matter of the arrest or detention. This statement was uncontradicted.

On the close of the case, defendant's Counsel called on the Judge to direct the jury to find for the defendant—this he refused to do, but left the case to the jury, who found for the plaintiff—damages, £98.

An order *nisi* having been obtained to set aside this verdict, and to enter a nonsuit, pursuant to leave reserved, or to set aside the verdict, on the ground of the admission of illegal evidence and misdirection, and as being against evidence and contrary to the charge of the learned Judge—

*Macdonogh* (with him *Rolleston*) showed cause.

The only question in this case is, was there any evidence of authority given to Boon to make the statements he had made to the Sheriff or bailiff? Boon had doubts as to the identity of the prisoner, and was guilty of negligence, and acted without adequate knowledge; and the defendant cannot now be allowed to disavow the acts of his servant and agent. The bailiff went to the defendant's place of business at a reasonable hour, and Boon represented the defendant in his absence—he being his foreman; and further, we have the defendant's attorney adopting the act of Boon: from all these circumstances taken together, the Court

M. T. 1853. will imply that Boon had the necessary authority given him:  
*Queen's Bench* *Humphrys v. Pratt* (a).  
 KINAHAN  
 v.  
 MALYN.

*Fitzgibbon and D. Lynch, contra.*

The charge against the defendant in the first count of the declaration is, that he wilfully, falsely and negligently made the representation; and in the second count the allegation is, that Boon made it, and both these allegations are contradicted by the evidence. The arrest took place before the representation was made; the ground of action, therefore, was not proved—namely, that the defendant induced the bailiff to arrest the plaintiff and commit him to prison. The Sheriff was at the time a wrong-doer, and it is but one trespasser suing another. There was nothing fraudulent in Boon's act, he acted *bona fide*, supposing the right person had been arrested. In *Humphrys v. Pratt*, the statement was made gratuitously by the plaintiff in the execution. Here Boon's act was altogether independent of the defendant. He was not his agent for any such purpose; he might as well be looked on as the agent of the plaintiff: *Collins v. Evans* (b). Further, fraud is an essential ingredient in an action of this nature: *Taylor v. Ashton* (c); and no fraud was even suggested.

*Rolleston* replied.

Boon, by his acts, constituted himself agent to the defendant. He was the party who served the writ on the real defendant, and, having identified the party, he adopted the Sheriff as his agent: *Adamson v. Jarvis* (d). Boon did not act for his own benefit; and a subsequent assent by another to an act of trespass, done for his benefit, will make him a trespasser by relation: *Wilson v. Barker* (e); *M'Loughlin v. Pryor* (f).

PERRIN, J.

I think there is no evidence that Boon wilfully and falsely stated

(a) 3 Bli., N. S., 154.

(b) 4 Bing. 66; S. C., 5 Q. B. 805.

(c) 11 M. & W. 401.

(d) 4 Bing. 66.

(e) 4 B. & Ad. 614.

(f) Car. & M. 365.

that Henry De Wilton was the man to be arrested. There is evidence that he was mistaken, but also evidence that he believed what he said was true. Further, there is no evidence to show that his act was the act of the defendant; for it does not appear to have come to the knowledge of the defendant that the person arrested was not the right person, until the 12th. But there is no evidence that Boon falsely stated he was the right person, and, therefore, not such a statement as supports the allegation in the declaration.

M. T. 1853.  
*Queen's Bench*  
KINAHAN  
v.  
MALYN.

LEFROY, C. J.

In this case we are of opinion that the Judge would have acted right if he had nonsuited in the first instance; however, the learned Judge reserved the question for the Court, and we think a nonsuit must be entered.

This is an action for a wilful and false representation, whereby the plaintiff alleges he was deceived, and in consequence of that deceit the detention of the party complained of took place. There is no evidence to sustain that allegation; no evidence to charge the defendant with any one personal act; nor is there any evidence of a wilful and false representation by Boon, for whose act the defendant is sought to be made responsible, nor of any authority in him to make a representation to the plaintiff; nor evidence of the adoption of that wilful and false representation, even if there could be any such adoption in point of law, as to make him liable substantively and independently. We, therefore, are of opinion, there is a total defect of evidence to sustain the allegations in the declaration. The case is clearly distinguishable from the case of *Humphrys v. Pratt*; there the party acted for himself, in a matter constituting the trespass, setting the Sheriff in motion, and requiring him to seize. In the present case there was no personal intervention.

But it is said this action is brought for the subsequent detention. There is something novel in this; a party is liable for the original detention, and sued, and then the original cause of action is sought to be split into two causes of action, one laying the



M. T. 1853. detention as the subject of consequential damages, and the other  
*Queen's Bench* a separate action for that detention.

KINAHAN

v.

MALYN.

CRAMPTON, J., concurred.

PERRIN, J.

On the evidence, there was nothing to go to the jury to warrant them in finding that Boon had falsely and wilfully represented any thing in the matter.

MOORE, J.

I concur. The only difficulty I felt was, as to the transaction of the 12th instant, in which the attorney of the defendant took part; but on looking at it, I think it was nothing but what either principal or attorney might do. But there was no evidence to go to the jury to connect Malyn with any false representation, and the only question in the case was, as to the effect of the evidence.

Judgment of nonsuit accordingly.

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M. T. 1853.  
*Exch. Cham.*

**Exchequer Chamber.\***

SCOTT

v.

THE MIDLAND GREAT WESTERN RAILWAY CO.

(Error from the Court of Common Pleas.)

Nov. 16, 23.

THIS was a writ of error, brought on a judgment pronounced by the Court of Common Pleas, in Easter Term 1852. The facts and arguments are fully stated in the report on the bill of exceptions, *ante*, p. 69.

*Napier* and *Otway*, appeared as Counsel for the plaintiff in error;—

*Duggan* and *Richard Armstrong*, for the defendants.

The following cases were cited: *Jackson v. Rogers* (a); *Pickford v. The Grand Junction Railway Co.* (b); *Bac. Abr., Carrier*, B; *Story on Bailments*, p. 328; *Willis v. Peckham* (c); *Massiter v. Cooper* (d); *Ashmole v. Wainright* (e); *Cartwright v. Rowley* (f); *Wakefield v. Newbon* (g); *Close v. Phipps* (h); *Cheesman v. Exall* (i); *Chippendale v. The Lancaster and Yorkshire Railway Co.* (k); *Austin v. The Manchester and Lincolnshire Railway Co.* (l); *Carr v. The Lancashire and Yorkshire Railway Co.* (m).

B, by letter, agreed to carry the goods of A to D, but before the removal of the goods, a third party came forward claiming property in them, and B refused to remove them, unless he got an indemnity, which was accordingly given, with power to B to detain the goods, until A satisfied him he was entitled to them. Held, in an action of trover brought by A for these goods, affirming the judgment of the Common

Pleas, that this second agreement was a binding contract on A. Held also, the agreement to abandon the former contract, and to carry the goods, was sufficient consideration for the contract.

(a) 2 Show. 332.

(b) 8 M. & W. 372.

(c) 1 Br. & B. 515.

(d) 4 Esp. 260.

(e) 2 Q. B. 837.

(f) 2 Esp. 723.

(g) 6 Q. B. 276.

(h) 7 M. & Gr. 586.

(i) 6 Ex. 341.

(k) 21 Law Jour. 22, Q. B.

(l) Ibid, 179, C. P.

(m) Ibid, 261, Ex.

\* PENNEFATHER, B., RICHARDS, B., and MOORE, J., *absentibus*.

M. T. 1853.

*Each. Cham.*SCOTT  
v.MIDLAND  
G. W. RAIL-  
WAY.

LEFROY, C. J., pronounced the unanimous judgment of this Court, affirming the judgment of the Court below:—

This is a writ of error, brought on a judgment of the Court of Common Pleas on a bill of exceptions. MONAHAN, C. J., left the case to the jury upon this point, that the Company, before they were required to deliver up the goods, ought to have been satisfied, according to the terms of the document appearing on record, that the party demanding them was entitled to get them. He left it to the jury to consider whether satisfactory proof was given, entitling the party to the delivery of the goods. The only exception relied on was, that the document was not a binding contract, being invalid for want of consideration. The argument very much turned upon that point; but another question was also raised—namely, that the contract was obtained by duress. With that, however, we have nothing to do, as no exception was pointed to it—we give judgment merely on the assumption that there was a binding contract on the defendants to remove the goods to Dublin at the time mentioned in the letter.

The action of trover is brought on the supposed conversion of the goods; and the evidence in support of that action is, that a demand had been made on the defendants to deliver up the goods unconditionally. The defendants, however, relied on the stipulation contained in the letter of the plaintiff, and that there was no evidence of conversion; but for the plaintiff it was insisted that stipulation was without consideration, and a void contract, and that, consequently, the defendants were not entitled to rely on that letter.

Now, it is to be observed, that this is not an action for a breach of contract in not carrying the goods, or for wrongfully coercing a party into a stipulation, whereby he was deprived of his goods—neither is it an action on a contract obtained under duress; but it is an action for the entire value of the goods, on the ground of a wrongful conversion. The plaintiff relies on a series of authorities, which, unless they prove the contract to be null and void, are totally inapplicable to the present case. None of them show that this was a void contract between the parties—none of

them show that a carrier is incompetent to make an express stipulation. No doubt they establish that, if a carrier attempts tortiously to impose on and oppress the party, that is a void contract; but that is not the contract here. In this case there was no duress. But, it is said, the party had a valid contract without this stipulation. Supposing that to be so, is there any thing to prevent their coming in to qualify and vary that contract? The very circumstance that they agreed to vary it, affords consideration for a new contract, or for waiving or varying the original. The cases referred to show plainly that parties are free to waive, vary or create a new contract.

It was further urged there was no consideration. The agreement to carry the goods was a sufficient consideration; and further, there was the mutual agreement of the parties to abandon the former contract. The plaintiff does not stand upon his rights, and say, at your peril carry these goods—he does not do that; but he agrees to abandon the former contract and enter into a new one; there is, therefore, abundant consideration. If, then, these parties were competent to enter into a new contract, and did so, how can the plaintiff say this was a wrongful conversion? The proposition is utterly untenable. We, therefore, are of opinion that this action is not maintainable, and that the learned Judge left the question properly to the jury; and, therefore, that the judgment of the Court below must be affirmed.

Judgment affirmed.

M. T. 1853.  
*Exch. Cham.*  
SCOTT  
v.  
MIDLAND  
G. W. RAIL-  
WAY.

E. T. 1854.

Exchequer.

In re M'NALLY.

April 25.

May 3.

(Exchequer).

A person having been admitted an attorney, under very peculiar circumstances, without having served an apprenticeship, the order so admitting him was subsequently rescinded, on the ground of the suppression by him of a prominent fact amongst the circumstances on which his application was based, although the suppression did not appear to be with the intention of misleading or deceiving the Court. The utmost candour, and the most full disclosure of facts are required by the Court, upon such applications, which are most exceptional in their character.

THIS was an application, on the part of the Law Society, that Mr. M'Nally, who had been admitted an attorney of this Court, under peculiar circumstances, without having served an apprenticeship, should be struck off the roll, on the ground that the order admitting him had been obtained upon the suppression of an important fact. One of the grounds which influenced the Court, in making the order of admission, was the assurance of the applicant, through his Counsel, that the suits then pending in his deceased brother's office were to be carried on for the sole benefit of his widow and family. It had since appeared, upon the trial of an action for compensation for the death of her husband, brought by the widow against the Great Southern and Western Railway Company, that on the 11th of November, and previous to the application of Mr. M'Nally to this Court, a deed had been executed by her, assigning to him all her interest in the costs due to her husband at the time of his death, and in the pending suits, for £1175. It was not denied that the consideration in this deed was fully adequate, but the fact of its existence had been kept from the Court.

The *Attorney-General* (with *Martley*), for the Law Society.

*Macdonogh* and *Ball*, for Mr. M'Nally.

The facts, and reasons of the Court, sufficiently appear from the judgment, and by reference to the report of the former motion, *ante*, p. 518.

PIGOT, C. B.

This is a very peculiar case, as to Mr. M'Nally, and for its possible consequences to the widow and family of his deceased brother.

But it is one in which, for the general interests of justice and the profession, and especially for the interest of suitors, we must act without regard to any feeling in favour of any individual who may be affected by our decision. We are bound to guard against the establishment of a precedent that might work wrong to any of those interests. At the time of the original application of Mr. M'Nally, we said that the case was most exceptional. Rules have been laid down by the Legislature and the Judges ; a practice has been established by those who have to consider the preliminaries necessary to the profession of an attorney. All these rules and that practice have been adopted, first, to give security to the public, and next, to sustain the dignity and character of the profession. In many instances of great individual hardship, the Court has refused to relax those rules, because the required preliminaries were not complied with. In very rare instances, the Court has yielded to such applications as the present, influenced by circumstances peculiar to the condition of the deceased attorney, both in respect to his family and his clients. In the present case, there existed a great variety of considerations to influence the Court. The applicant was well educated ; he had undergone a preliminary education in reference to the profession of the law, and had had that practical training in the office of his brother, qualifying him to carry it on practically. The interest of the suitors also, who were his brother's clients, was best promoted by his admission. That brother also had been removed by the hand of Providence, under circumstances against which ordinary foresight could not have provided. We thought, therefore, he might be admitted, understanding that his object was the benefit of his brother's family. The case was a most exceptional one, not to be drawn into a precedent ; for every case must stand on its own peculiar circumstances, and requires the most careful consideration. But in all cases, it is essential that the entire facts should be laid before the Court. For some time past, also, a Society, greatly to the satisfaction of the Court, has interfered to assist the Court in cases which concern the interests of the profession ; and in every case of this kind, all the facts should be furnished, not only to the Court, but to this Society. Every application of this

E. T. 1854.

Exchequer.In re

M'NALLY.

M. T. 1854. kind involves something more than a mere appeal to a Court of Justice. The Judges are members of both families of the profession, and, placed on the Bench, do not cease to belong to them. Therefore, in an application of this nature, where the interests of the profession are involved, there should be an entire and complete disclosure of all circumstances which may affect any member of it. If a suppression of a material fact will vitiate a contract between strangers, how much more should it affect a case of this kind? In this case, unfortunately, from whatever cause, the applicant has not made a full disclosure of all the circumstances of it. I do not mean now to speculate on what we should have done if such had been made—enough, that there was a fact which ought to have been presented to us, and we must not make a precedent founded on a partial disclosure, when a full one ought to have been made. I will not say, and I do not come to the conclusion, that Mr. M'Nally had any design to deceive the Court. I absolve him entirely from that imputation, which indeed has not been cast upon him. I am not satisfied that he might not conscientiously have believed that the arrangement he had made substantially corresponded with the case presented to us. If he had obtained our order without having entered into the agreement, and subsequently made it, I do not say that it would have been inconsistent with the order. The foundation of my opinion is that Mr. M'Nally ought to have stated the entire transaction and all its details to the Court, and that he cannot be permitted to hold a position which he has obtained otherwise. As to the consequences of our decision to him, we cannot entertain that consideration; in fact, he now stands in as good a position as when he made his application. He is now an apprentice, and does not cease to be so. I do not say but that he may be allowed the period which has elapsed since he became so, as part of his apprenticeship. I am desirous of withholding any expression calculated to injure his character or impede his entrance into his profession. The order will be, not to strike him off the roll, but to set aside the order of this Court admitting him, without prejudice to his making an application hereafter that he may be

allowed the time already elapsed, as part of his service. It does appear that he intentionally omitted to make a statement of a particular fact, but not with a view to his own interest.

E. T. 1854.  
*Exchequer.*  
*In re*  
 M'NALLY.

PENNEFATHER, B.

The suppression, I think, was not with a view of deceiving the Court, but it was not an unintentional omission.

BOYLE v. HAMMOND.

May 10.

BYRNE applied, under the 83rd section of the Common Law Procedure Act, to set aside the demurrer filed in this case, as frivolous, and calculated to embarrass the plaintiff. The action was one for a malicious prosecution; to support which three things were essential:—first, that the prosecution should be malicious; secondly, without probable cause; thirdly, that it terminated in favour of the plaintiff. The plaintiff here states that the defendant, at an assize held in Drogheda, in, &c., maliciously caused and procured the plaintiff, without any reasonable or probable cause, to be falsely indicted for receiving stolen property, knowing the same to be stolen; “and the defendant did prosecute and cause the said indictment to be prosecuted against the plaintiff, until he afterwards, at the said general sessions of Oyer and Terminer, &c., was duly and according to law, by a jury of, &c., and by the judgment of the Court, there acquitted thereof, by means of which said premises the plaintiff had been brought into public disgrace.” The defendant pleaded, traversing that he had maliciously, and without probable cause, caused the plaintiff to be indicted, and demurred to the latter

Where to a plaintiff in an action for malicious prosecution, averring that the defendant, maliciously and without probable cause, caused the plaintiff to be falsely indicted for, &c., “and the defendant did prosecute, and cause the said indictment to be prosecuted,” &c., the defendant dividing the plaintiff into two parts, traversed the statement that he maliciously caused the indictment to be preferred, and demurred to that part of the plaintiff which averred that he prosecuted the indictment, &c., for the omission of an allegation that he had done so “maliciously,” &c. The Court, holding that the plaintiff disclosed but a single cause of action, and that the mode of defence was calculated to embarrass the plaintiff, set aside the demurrer with costs, giving the defendant leave to plead to the whole plaintiff.

cuted the indictment, &c., for the omission of an allegation that he had done so “maliciously,” &c. The Court, holding that the plaintiff disclosed but a single cause of action, and that the mode of defence was calculated to embarrass the plaintiff, set aside the demurrer with costs, giving the defendant leave to plead to the whole plaintiff.



E. T. 1854. part of the plaint, from the words "and the defendant did prosecute," &c., on the ground that it was not averred that the defendant did so maliciously; that part of the plaint, therefore, disclosing no cause of action. The plaint, on the whole of it, discloses but one cause of action, the word "maliciously," in the commencement of it, applying to the whole.—[PENNEFATHER, B. This is a very bad defence. The plaint shows but one cause of action, and the mode of defence endeavours to split it into two. What do they say on the other side?]

*Exchequer.*  
BOYLE  
v.  
HAMMOND.

*Richard Armstrong* (with him *Hemphill*).

A person may maliciously prefer an indictment and yet prosecute it *bona fide* and justifiably, and *vice versa*. On this ground, a plea to an action for malicious prosecution, averring that the defendant procured the charge to be made, on reasonable and probable cause, and then setting out the circumstances which constituted that reasonable and probable cause, was held bad, for omitting to state that those circumstances were known to the defendant when he made the charge, or that he acted on them: *Delegal v. Highly* (a). On this plaint, the defendant might show that he was not actuated by malice in following up the prosecution. The plaint states two grounds of action.—[PIGOT, C. B. The preferring and prosecuting an indictment are but one cause of action if the indictment be prosecuted. If the plaintiff were to take issue on what you have traversed, he could not sustain a judgment in his favour. If the demurrer is allowed to stand you must also succeed.]—We having taken issue on the mere preferring the indictment, it is a sufficient cause of action to the plaintiff: *Payne v. Porter* (b).—[PENNEFATHER, B. An averment that the case had terminated is necessary.]

*Byrne*, in reply.

If the defence traversed the entire cause of action stated in the plaint, it would be unobjectionable, but it does not do so.

(a) 3 Bing. N. C. 950.

(b) Cro. Jac. 490.

Pigot, C. B.

We must set aside the demurrer, with costs, giving the defendant leave to amend his pleading, by pleading to the whole plaint; the plaintiff also inserting the word "maliciously" in the averment as to the prosecution of the indictment by the defendant.

Rule accordingly.

E. T. 1854.

*Exchequer.*

BOYLE

v.

HAMMOND.

DALZIEL v. WALKER.

May 10.

HAMILL, for the plaintiff, moved for leave to mark judgment, notwithstanding the defence filed, inasmuch as it contained matters which could not be pleaded together without an order of the Court; or that the defendant's fifth plea should be taken off the file, as amounting to the general issue, and calculated to embarrass the plaintiff. The action was for £30, expended on the support of the defendant's illegitimate child. The plaintiff alleged that the defendant was indebted to the plaintiff in £30, for money payable by the defendant to the plaintiff for the support of the defendant's child, at his request, and for money paid by the plaintiff for the defendant, at his request, and for money due on accounts stated, &c. The defendant pleaded pleas traversing the different allegations in the plaint, the Statute of Limitations, and a fifth plea, averring "that he is not, and was not, at the commencement of this suit, "indebted in the sum of £30 or any other sum or sums of money, "on account of the several, or any or either of the several alleged "causes of action mentioned in said plaint." These various defences cannot be pleaded together without leave of the Court or a Judge; therefore the defendant is entitled to mark judgment, by the 45th General Order. At all events, the fifth plea amounts to the general issue, and should therefore be taken off the file: *Bannon v. Morris* (a).

To a plaint, containing a count for money paid for the support of the defendant's illegitimate child, at his request, and the common money counts, the defendant, along with pleas traversing the various allegations in the plaint, and a plea of the Statute of Limitations, pleaded, "that he was not indebted, &c., in the sum of £30, or any other sum, &c., on account of the several, or any, &c., of the alleged causes of action mentioned in said plaint." This plea was struck out on motion.

(a) 6 Ir. Jur. 139.

E. T. 1854. *Leach*, contra.

*Eschequer.*

DALZIEL  
v.

WALKER.

As to the first part of the plaintiff's application, if he be right that the pleas cannot be pleaded together without leave, it is unnecessary, as by the 45th General Order he may, in such case, mark judgment without an application to the Court. But the 58th section of the Common Law Procedure Act gives leave to plead all these pleas without leave of the Court or a Judge. The fifth plea is in accordance with that section, being "a denial of the debt alleged in the declaration."—[GREENE, B. That is not in accordance with the 56th section, which requires you to set out the facts which constitute your defence. This plea is the general issue.]—Section 69 raises an inference that it was not the intention of the Legislature to take away the power of pleading the general issue in all cases.—[GREENE, B. This is either a repetition of your first pleas, or the general issue.]

PIGOT, C. B.

We cannot allow these pleas to stand together. The last plea must be struck out.

PENNEFATHER and GREENE, B.B., concurred.

Rule accordingly—costs in the cause.

# REDDICK v. CAVANAGH.

May 10.

To a plaintiff, BALL moved, under the 83rd section of the Common Law Procedure Act, that the second and third pleas filed by the defendant upon a bank-er's cheque, the defendant, among other pleas, pleaded fraud and covin, and a plea of misrepresentation generally, without setting out the facts of either. On a motion to strike out those pleas, as framed to embarrass, or that the defendant should set out the particular facts of each—*Held*, in the absence of an allegation in the plaintiff's affidavit, that he was ignorant of the circumstances constituting the alleged fraud, that such plea may be pleaded generally; but that the facts constituting the misrepresentation should be set out, either in the body of the plea or in the particulars.

tiff, or else that the defendant should amend them, by setting out the particular instances of fraud and misrepresentation on which he relied.

E. T. 1854.

*Exchequer.*

REDDICK

v.

CAVANAGH.

The action was brought on a banker's cheque, which had been indorsed over to the plaintiff. The defendant had countermanded the payment before the cheque was presented; and, with several other pleas, pleaded that he had been induced to make the cheque by fraud and collusion between the plaintiff and one Timmins; and also, that the cheque had been obtained from him by the misrepresentations of the plaintiff and Timmins, and without consideration. These pleas are vague and uncertain. The defendant is bound to state the facts which constitute the fraud and misrepresentation: section 56, Common Law Procedure Act. The truth or falsehood of those facts is the thing to be tried. Before the late Act, the pleas would have been bad.

*Purcell, contra.*

As to the first part of plaintiff's motion, that the pleas be set aside, there is nothing to prevent or embarrass the plaintiff in taking issue upon them. Leave to plead them was obtained on affidavit. As to the second part, it is sufficient to allege generally fraud and covin.—[GREENE, B. It would have been so before the late Act.]—The Act releases the stringency of the rules of pleading. The reason of the old rule is not changed, viz., the avoidance of prolixity; and fraud and covin generally consist of a multiplicity of circumstances: *Hill v. Montague* (a); *Stephen on Pleading*, p. 383. As to the plea of misrepresentation: *Mallalien v. Hodson* (b).—[PIGOT, C. B. As to the defence of fraud, I think it may stand; the multiplicity of circumstances, acts, words, which may go to make it up, may render it necessary that it should be pleaded thus generally for convenience. But it is different as to misrepresentation; that must be some positive statement which the party must know, and therefore, it may be easily set forth. If, indeed, we found the misrepresentation so prolix as to load the record, we might, under the

(a) 2 M. & S. 377.

(b) 16 Ad. & El. 689.

E. T. 1854. Act, allow you to plead it generally, and set forth the facts of it  
Exchequer. in your particulars.]

REDDICK

v.

CAVANAGH.

*S. Ferguson*, in reply.

As fraud is not a fact, but a legal inference, they should, under the 56th section, set out the facts which constitute it.

*Purcell.*

If so, it might be necessary to set out the whole of the evidence in the case.—[GREENE, B. Could you not state generally some facts constituting the fraud? I see no difficulty in stating what the fraud was, without stating every part in support of it.]

PIGOT, C. B.

In the absence of any allegation in the plaintiff's affidavit, that he is ignorant of the circumstances which constitute the alleged fraud, the Court will not require the defendant to set out those circumstances. But we think he should set out in his particulars the facts which constitute the misrepresentation.

Rule accordingly—costs in the cause.



;

— v. M'DONOGH.

June 8.

Leave will not be given, under sec. 57, Common Law Procedure Act, to file several inconsistent pleas.

MALLEY applied for leave to plead in this case (an action for libel) a plea of privileged communication, with one denying the writing of the libel.

GREENE, B.

You might deny that the writing is a libel, and also plead privilege, but we will not give you leave to plead two pleas, so inconsistent as those you desire.

T. T. 1854.

Exchequer.

## SMITH v. GRANT.

June 10.

PURCELL moved that the plea of the defendant should be set aside, and for leave to mark judgment. The plaint was for goods sold, &c. and the defendant pleads that he does not owe, &c. This is the general issue: *Dalziel v. Walker* (a).

A plea amounting to the general issue will be set aside, and leave to mark judgment granted, in the absence of an affidavit of merits by the defendant.

*O'Hea* applied for leave to amend. No affidavit of merits.

*Per Curiam.*

Grant the motion, with costs.

(a) 6 Ir. Jur. 271.

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M. T. 1853.

Queen's Bench

THE QUEEN; at the prosecution of JAMES TORLEY,

v.

ALICE CAMPBELL.

*(Queen's Bench).*

Nov. 22.

A *certiorari* lies to remove an order made by a Justice of the Peace, under the Petty Sessions Act, when the order was made without jurisdiction.

All orders made under this Act should be signed by the Justice, and should show, on the face of them, that he had jurisdiction to make the order.

In this case a rule *nisi* had been obtained on behalf of the prosecutor, that a writ of *certiorari* do issue, to be directed to Isaac Corry, one of her Majesty's Justices of the Peace for the county Down, and to the Clerk of the Petty Sessions for the district of Newry, in said county, to remove into this Court a certain order, made 15th of June last, by the Justice present, in the matter of the complaint of Alice Campbell, complainant, and James Torley, defendant, relative to the quality of a pair of shoes, purchased by her from the said James Torley, together with all documents connected with said order; or that the said order so made by the said Justice be quashed, unless cause, &c.

No cause having been shown against this conditional order, it was made absolute, and in pursuance thereof, a return was made by Isaac Corry. The return certified, that on hearing of a summons, issued under the 14 & 15 *Vic.*, c. 93 (Petty Sessions Act), on a complaint, that a dispute arose between Alice Campbell and James Torley, relative to the quality of a pair of shoes, purchased by the complainant from the defendant, an order was made on the 15th of June 1853, by the Justice present, against James Torley, "to pay the value of the shoes, 2s., and for costs, 3s." This order was made by Isaac Corry, but not signed by him.

*Perrin and O'Hagan*, for the *certiorari*.

This conviction was had under the 14 & 15 *Vic.*, c. 92, s. 17, enacting, that whenever any dispute shall arise between any buyer and seller, relating to the terms of sale, delivery, price or payment, for any article, matter or thing, which shall be exhibited for sale

in any fair or market (and which shall not be of greater value than £5), it shall be lawful for any Justice, within his jurisdiction, either to proceed at once to hear and determine such dispute, upon the complaint of either party, and in presence of both parties, and after causing all parties to be brought before him for that purpose; or to adjourn the hearing thereof to the next Petty Sessions of the district; and it shall be lawful for the Justice or Justices, at such Petty Sessions, having examined into the said complaint, upon the oath of either of the parties, or of any witness or witnesses, to make an award thereon, according to the merits of the case, and such award shall be in writing, and shall have the like force and effect as any order made at Petty Sessions.

M. T. 1853.  
*Queen's Bench.*  
 THE QUEEN  
 v.  
 CAMPBELL.

This order, purporting to have been made under the powers given by that section, is clearly bad, as it does not show any jurisdiction in the Justice to make it, or any cause of complaint, or a state of facts showing jurisdiction. It is also illegal, as not being signed by the Justice, and in not stating that an order had been previously made. To bring it within the provisions of the section, it ought to state that a dispute had arisen relating to a sale in a fair or market; otherwise the Justice would have no jurisdiction: *Day v. King (a)*.

It may be said, that a *certiorari* is taken away by the 24th section of the Act, enacting, that no order made under the provisions of this Act, nor any adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of her Majesty's Courts of Record; but that only applies to orders made within the jurisdiction of the magistrate; but when he acts without jurisdiction, a *certiorari* lies: 1 *Smith, L. C.*, 387, L; *Rex v. Justices of West Riding of Yorkshire (b)*. The 12 *Vic.*, c. 16, s. 2, renders the magistrate liable to an action, for making an order outside his jurisdiction, in case such order shall be quashed by this Court.

*Ross Moore* and *R. Armstrong*, contra.

This objection comes too late; it should have been raised on the granting of the conditional rule.

(a) 5 A. & E. 359.

(b) 5 T. R. 629.



M. T. 1853.  
*Queen's Bench.*  
THE QUEEN  
v.  
CAMPBELL.

CRAMPTON, J.

The question does not arise on the conditional order.

MOORE, J.

This is an order made on a complaint for a civil injury, and is therefore not to be as strictly construed as a conviction on a criminal charge. The magistrate specifies the statute under which he exercised this jurisdiction, the schedule to which gives a form of order requiring the statute to be stated; that was sufficient to call the attention of the parties to the statute, and the jurisdiction given to the Justices thereunder.

PERRIN, J.

How can we assume the magistrate acted under the statute, by his merely stating he did so, if the facts do not justify his proceeding under it?

*O'Hagan*, in reply, was not called on.

CRAMPTON, J.

The principle applicable to this case is plain. The writ of *certiorari* is taken away by 14 & 15 *Vic.*, c 93—with this exception, that when a magistrate acts without the sphere of his jurisdiction, the writ will be granted, otherwise the jurisdiction of this Court in all cases would be set aside. It is well settled that in orders of this description the jurisdiction ought to appear on the face of the order. How does it appear here? The Justice states that a dispute had arisen about the quality of a pair of shoes, but he does not state where that dispute had arisen: and it was essential to the jurisdiction for him to state that the purchase had been made in a fair or market; for if it had been made elsewhere, he had no jurisdiction.

But it is said, because he referred to the statute giving him jurisdiction, we are to assume that he exercised that jurisdiction properly. He might as well have referred to the principles of Common Law. By allowing this order of the Justice to stand,

magistrates might conceive they would have authority to make similar orders in matters outside their jurisdiction; we feel no difficulty in saying that this order of the Justice cannot stand, we therefore make the rule absolute for the *certiorari*, but we give no costs.

M. T. 1853.  
*Queen's Bench*  
THE QUEEN  
v.  
CAMPBELL

Rule accordingly.

THE QUEEN, at the prosecution of WILLIAM SMITH,

v.

MARTIN O'BRENNAN.\*

H. T. 1854.

Jan. 11, 12,  
17.

In this case a conditional order had been obtained on behalf of the prosecutor for a writ of *certiorari*. This order was in the following form:—

<p>"The Queen, at the prosecution of "William Smith, v. Martin O'Brennan. }</p>	<p>"It is ordered by the Court "that a writ of <i>certiorari</i> do "issue, directed to Hugh O'Callaghan, one of her Majesty's Justices "of the Peace for the district of the Rotundo division of the Dublin "Metropolitan Police, to remove into this Court any articles of the "peace exhibited by Martin O'Brennan against the prosecutor, the "charge entered against the prosecutor on the 14th of October, at "the police-station for said division, the information made on or "after the hearing of a certain charge preferred against said pri-</p>
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In showing cause against an order nisi for a *certiorari*, it is no objection to the affidavit on which it was obtained, that it is not entitled in the cause. The affidavit, although sworn by a marksman, is not objectionable, because of the omission in the jurat by the officer, that the deponent understood what was sworn to.

The conditional order was properly drawn up, by naming the prosecutor in the Court below the defendant in the order.

A writ of *certiorari* will be granted to return a charge, information and recognizance, on the application of a person arrested and bound over to keep the peace, on an information sworn before a police magistrate, though the applicant be not in actual custody, and not before the Court under a writ of *habeas corpus*. The writ will be granted even though it lead to ulterior proceedings against the Justice whose conduct is the subject-matter of inquiry.

\* FERRIN, J., *Absente*.

H. T. 1854. "soner by said defendant on the 15th of October, before the said  
*Queen's Bench* "Hugh O'Callaghan, together with the order made by the said  
 THE QUEEN "Justice on the hearing of the said complaint, and the recogni-  
 v. "zance entered by said prosecutor, unless cause," &c.  
 O'BRENNAN.

This conditional order had been obtained on the affidavit of William Smith the prosecutor, which stated that he had been for some years employed in distributing hand-bills to passengers in the streets of Dublin, by which means he earned his livelihood. That on the 14th of October, he was occupied in the course of his said employment in distributing copies of a certain hand-bill, of which he had distributed between 400 and 500 copies to persons passing, who willingly accepted them. That without the remotest intention of offending, he offered a copy to a lady who was passing at the time, leaning on the arm of Martin O'Brennan. That O'Brennan stretched his hand across the lady and took the bill out of deponent's hand and passed, without making any remark to prosecutor, but returned in about five minutes, and seized deponent and dragged him violently along the street, and gave him in charge to a policeman, who took deponent to the police-station, where O'Brennan preferred a charge against him for annoying him by handing him a paper repugnant to his religious feelings. That this charge was taken down in writing, and deponent was detained in custody for half an hour, until he procured bail for his appearance. That on the following day, when he attended at the police-office, the charge came on to be heard before Hugh O'Callaghan, the Justice presiding, and O'Brennan gave evidence in support of the charge, but did not allege that deponent had committed any breach of the peace, in reference to O'Brennan, or had threatened or intended so to do, or that he had any reason to apprehend or suppose that deponent would commit a breach of the peace, or assault him, or would menace him with personal violence. That O'Brennan did not swear that in offering said hand-bill this deponent spoke to him; and that deponent, until violently seized by O'Brennan, never spoke to him in his life, and never did use any unbecoming, violent or threatening gesture towards him. That the said Justice, having heard O'Brennan, forthwith gave his judgment, and thereby ordered

deponent to enter into a recognizance to be of good behaviour for the future, or be committed to gaol for fourteen days. This affidavit was sworn to by a marksman, and the jurat said nothing as to his understanding it when read to him.

H. T. 1854.  
*Queen's Bench*  
THE QUEEN  
v.  
O'BRENNAN.

The attorney of William Smith also made an affidavit, stating that he had applied to Hugh O'Callaghan for the copy of the information, and had been refused by him, he stating that unless directed by an order of a Court having competent jurisdiction, requiring him to do so, he would not give it.

As cause against this conditional order, Hugh O'Callaghan made an affidavit, stating he was unable to produce the recognizance, as same was lodged in the office of the Clerk of the Peace. That he acted according to the best of his judgment in adjudicating on the matter, and according to his opinion, the conduct of the prisoner was calculated to produce a breach of the peace.

O'Brennan also made an affidavit, in which he stated that the prosecutor thrust the hand-bill into his hand, and on doing so, laughed in his face. That he then examined the hand-bill, and found it contained offensive matter, treating with abuse some of the tenets and doctrines looked upon as sacred by those professing the religion of defendant; that such was calculated to provoke a breach of the peace, and he accordingly gave the prosecutor in charge.

*Whiteside*, for the prosecutor, moved to make absolute the conditional order.

*Macdonogh*, contra.

Notice has been served on the part of O'Callaghan, to show cause against this conditional order, on the same day that the order was served to make the rule absolute.

*Per Curiam*.

The practice is settled, when Counsel on both sides are present, that the Counsel showing cause is to begin.

H. T. 1854.

*Queen's Bench*

THE QUEEN

v.

O'BRENNAN.

*Macdonogh.*

This application for a *certiorari* is unsustainable, both in form and substance. The conditional order founded on the affidavit is entitled in a cause, there being no cause existing; but even supposing it ought to be entitled, it is informally entitled; the proper person to be named as defendant would have been O'Callaghan.

Further, the affidavit is informal; it was made by the prosecutor Smith, who is a marksman, and the jurat of the affidavit should state that the depositions had been read over to him, and that he seemed to understand them. 2 *Gude, C. P.*, p. 381. He could not be convicted for perjury on such an affidavit.

*Whiteside.*

If there has been any informality in the order or affidavit, it has been waived by defendant's having filed affidavits as cause against the conditional order.

*Macdonogh.*

By appearing, and filing affidavits as cause against this order, we are not debarred from relying on these technical objections; *Clothier v. Ess* (a); *Birch v. Somerville* (b).

*Whiteside.*

Our affidavit is not entitled, though the conditional order is, and such is the proper practice; and in entitling the order in this form, the established practice has been followed. *Birch v. Somerville* is not applicable to the present case, as there the Act of Parliament was not complied with.

LEFROY, C. J.

The practice must be decided by the officer of the Court, and he has certified it is the uniform practice to entitle the order as has been here done; and no injury can result by adopting such practice. In a prosecution for perjury, the non-entitling of the affidavit would be no ground of acquittal, and therefore the objection to its not

(a) 3 M. &amp; Sc. 216.

(b) 2 Ir. Com. Law Rep. 67.

being entitled cannot prevail. The other objection depends on the omission of words of no value. It does not follow, because the affidavit is made by a marksman, he does not understand what he does; for it is certified that it was truly read to him, and he swears it is true. Orders on the civil side of the Court, which require the officer to certify that the party swearing understood the contents of the affidavit, are made in compliance with an Act of Parliament; and Mr. Wilson, a most experienced officer, has certified to us that no such rule of practice on the Crown side of the Court exists; we therefore are of opinion, these formal objections cannot prevail.

H. T. 1854.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 O'BRENNAN.

CRAMPTON, J.

I must say I feel a difficulty as to the correctness of this practice, but as the officer has certified the practice to be as here adopted, I yield to his statement.

MOORE, J.

I concur in yielding to the practice, being averse to turn a party round on a mere technicality of this sort.

*Macdonogh* (with him *O'Hagan*) then showed cause, and cited *The Queen v. Manchester and Leeds Railway Company* (a); *Parker v. Bristol and Exeter Railway Company* (b); *The King v. Doherty* (c); *Williams v. Lord Bagot* (d); *Anonymous case* (e); 2 *Hawk., P. C.*, book 2, c. 27; *Regina v. Dunn* (f); *Ex parte Humphrys* (g).

*Whiteside* and *Napier* (with them *Acheson Henderson*), for the prosecutor, relied on *Prickett v. Gratrex* (h); *Rex v. M'Kenzie* (i); *The Queen v. Dunne* (k); *Wilkes' case* (l); *Styles*, page 364;

(a) 8 Ad. & Ell. 413.

(b) 6 Exch. 184.

(c) 13 East, 171.

(d) 3 B. & C. 772.

(e) Loft's R. 348.

(f) 1 J. & S. 407.

(g) 4 New Sess. Cas. 179.

(h) 8 Q. B. 1020.

(i) 3 Bur. 1922.

(k) 12 Ad. & Ell. 599.

(l) 2 Nel. 180.

H. T. 1854. *Sir N. Storton's case* (a); *Rez v. Braithwaite* (b); *Fitzh. N. B., Queen's Bench* p. 80.

THE QUEEN  
v.

O'BRENNAN.

*O'Hagan* replied, and referred to *Haylock v. Sparke* (c); *Regina v. Mayor of London* (d); *Fitz. N. B.*, p. 245 a; *Bac. Ab., Certiorari*, a; *Rez v. Brooks* (e); *Lawless v. The Commissioners of Police* (f).

*Cur. ad. vult.*

LEFROY, C.J.

Jan. 17. This case comes before the Court on a motion to show cause why a writ of *certiorari* should not issue, directed to one of the police magistrates of the city of Dublin, commanding him to return into this Court certain proceedings which took place in his office, to enable the party complaining to take the opinion of this Court, whether an act done by the magistrate was a legal act, or whether, as alleged, it was illegal and oppressive, as founded upon want of jurisdiction.

We are not called upon, at this stage of the proceedings, to decide any thing with respect to the legality or illegality of these proceedings; we are simply to decide, whether we should have before us these proceedings, upon which alone we can form a proper judgment, as to whether the act complained of was warranted in point of law.

It was however contended, that this Court had no jurisdiction to issue the writ of *certiorari* for the purpose now sought. But even at first sight it would appear to be a strange proposition, that a magistrate could make an order, of the nature complained of, or any other order of that kind, without the possibility of the person complaining asking the opinion of this Court, whether that order was legal or not. However, upon looking into the authorities, we are enabled to state there is not a shadow of foundation for any of the objections which have been urged against the issuing of this

(a) *Freeman*, 354.

(c) 1 *Ell. & B.* 471.

(e) 2 *T. R.* 190.

(b) 2 *Lew. Cr. Cas.* 55.

(d) 5 *Q. B.* 555.

(f) 13 *Ir. Law Rep.* 367.

writ. The minor objections we have already disposed of in the course of the argument, and the substantial objections may be reduced to two.

H. T. 1854.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**O'BRENNAN.**

First, it is said, that the party complaining is not entitled to this writ of *certiorari*, because he was not in actual custody, and was not brought before the Court under a writ of *habeas corpus*.

Secondly, that this Court had no right to issue this writ, in order to obtain information as to the evidence upon which the order had been made. And it was also contended, that in the proper exercise of our discretion, we ought not to make the order, inasmuch as it would tend to expose the magistrate to ulterior proceedings, if his acts had been illegal.

It would appear somewhat strange that, when a party is ordered to do an act, or in default thereof to go to prison, he is bound to go to prison in order to enable him to inquire into the validity of the order, and that he could not assert his right without the sacrifice of his liberty. That assertion, however, has been made so repeatedly, and maintained with so much confidence, that we have thought it right to examine all the cases on the subject; we have done so from the year 1672 to the present time, and they show there is no foundation for the objection. It is a mistake to say that it is only in a case where the party is imprisoned that this Court will interfere. It is true, a party imprisoned is entitled to a *certiorari* to have the proceedings removed, and that for obvious reasons. The return upon the *habeas corpus* would only set out the warrant of committal; and if on the face of that, his detention appeared to be legal, he would have no remedy, unless he were entitled to have the other proceedings removed, for then only the Court would have every thing before them, to enable them to decide whether they would properly exercise their jurisdiction in discharging him. But there is no case which says the party must be in custody, to entitle him to this writ. If he were so, he would be entitled to the writ as a matter of course; but not being so, he is entitled, upon a *prima facie* case, to raise a question upon the validity of the Act complained of; and several cases will be found, as well when the applicant was not in custody as when he was.



H. T. 1854.

*Queen's Bench*

THE QUEEN

v.

O'BRENNAN.

The second ground of objection was, that the party was not entitled to have the informations removed by *certiorari*. The very same cases, applicable to the second objection, show that the Court never will proceed without having the whole of the proceedings before it, namely, the evidence and informations, in order to ascertain whether the Justice had the authority to do the act complained of.

The first case establishing these propositions is *Rudyard's case* (a). In that case a party had been committed by magistrates, under 34 *Edw. 3*, c. 1, which enabled them to require sureties for the good behaviour of the party charged; and he having been brought up on *habeas corpus*, the Court discharged him, on the ground of the insufficiency of the return. In that case the party was in custody; and I only refer to it for the sake of the principle there laid down. Tyrrell, J., says:—"The discretion of the Justices must be exercised according to law; and whether it be or no, the Judges in this hall must judge; and therefore the matter ought to be certainly certified to them." The next case is *Sir Nicholas Storton's case* (b). There a Justice was ordered by his Brother Justices at the Sessions to find security for his good behaviour, for having threatened a juryman, and he refusing, the Justices ordered him to be committed, but he was let to bail by two Justices, and being thus at large, he brought his *certiorari*; and the Court entertained the question whether the Sessions had power to commit him, being one of their Fellow-Justices, and held, upon his own showing, that the Justices had jurisdiction. In that case, the party applying was not in custody, nor was there any *habeas corpus*.

I will here refer to a case showing what will be required in order to oblige a party to enter into sureties of the peace. In an *Anonymous case* (c), Lord Holt lays down the law thus:—"To have security of peace of one, you must make affidavit of the cause of fear, and exhibit it in articles; and then make affidavit that you demand this, not of any ill-will or malice, but out of fear of

(a) 2 Vent. 22.

(b) Free. 354.

(c) 12 Mod. 565.

"some bodily hurt." The same is laid down in *Hawkins' Pleas of the Crown*, c. 60, s. 6. The next authority I shall refer to is *Com. Dig., Certiorari*, A 1, where it is laid down that the writ will lie to Justices at Sessions, upon an order made by them, or to a particular Justice, upon a conviction or order made by him. That is laid down without any qualification as to the party being in custody or not. The next case I shall refer to is *Rex v. Moreley* (a), a remarkably strong case, as the motion for the *certiorari* was made after a trial and conviction at the Sessions. But the *certiorari* was granted, and the Court says:—"A *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this Court is not taken away, unless there be express words to take it away. Therefore a *certiorari* ought to issue; and after a return made to it, you will be at liberty, and it will be still open to you, to move to supersede it, if there should appear reason for the Court so doing." In the case now before us, it is contended that the magistrate is entitled to withhold the information, to enable the Court to judge whether he has exceeded his jurisdiction. In the *King v. Bass* (b), Lord Kenyon says:—"It is admitted a *certiorari* is not to be granted *ex debito justitiæ*, but that the application is made to the sound discretion of the Court, which will not be well exercised if they do not give an opportunity to the parties applying for the writ to litigate any probable cause. For if there be a probable ground that injustice has been done below, the conviction ought to be removed, that it may be reviewed by this Court."

The next case I shall refer to is *Rex v. Tregarthen* (c). That was an application for a writ of *certiorari*, to remove the recognizances and informations taken against the defendant. A party gave information on oath before a magistrate, that from certain language used towards him, he was in bodily fear from another; and the magistrate, upon hearing the complaint, required the latter to enter into recognizance to keep the peace; and the question turned upon the construction of the language used—whether it was metaphorical

H. T. 1854.  
Queen's Bench  
THE QUEEN  
v.  
O'BRENNAN.

(a) 2 Bur. 1041.

(b) 5 T. R. 251.

(c) 5 B. &amp; Ad. 678.

H. T. 1854. *Queen's Bench* or otherwise; and the Court held it was for the Court below to decide upon the construction of the words, and refused to grant the order.

**THE QUEEN** But there was no *habeas corpus*—the party did not apply as a prisoner. That application was also to remove the informations and recognizance, but no objection on that ground. The Court entertained the motion, but held that on the case made by the applicant, the magistrate had jurisdiction, and was warranted in making the decision he had done. The next case I shall refer to is one of great importance, not only from the consideration given to it, but from the demerits of the party applying. It is the case of *The Queen v. Dunne* (a). Lord Denman, in giving judgment, says (p. 616):—

“Another ground taken was, that the Court of Quarter Sessions is a Court of competent jurisdiction to direct sureties of the peace on articles exhibited, and must therefore have power both to exercise a discretion over the cases in which that security is sought, and to decide on the proof of the facts on which their discretion is exercised. As to the former objection, it may be enough on this occasion to observe that the Court of King's Bench has in fact controlled the decision of the Justices, whether in or out of Sessions, to a much greater degree than was supposed at the Bar. Justices cannot go beyond the terms and fair meaning of the commission. The fair meaning is, that if one person informs the Court, or a Justice of the Peace, that he goes in fear and in danger of personal violence from another, by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may be granted. Unless such a case appear, no jurisdiction appears, nor can we ever infer facts necessary to give jurisdiction, from the mere circumstance of an inferior Court assuming to act as if they possessed it; least of all where, by the exercise of a discretionary power or an *ex parte* statement, which is not allowed to be contradicted, a single magistrate may deprive the subject of his personal freedom.”

The last case referred to, *Haylock v. Sparke* (b), shows how unfounded the argument is that this writ can only be granted where a party is in prison or brought up under a *habeas corpus*. For in

(a) 12 A. & E. 599.

(b) 1 EL. & B. 473.

that case the party had been discharged, on the 6th of May 1852; and the warrant, the illegality of which was the question, was brought up by *certiorari* on the 12th of June, when the party was at full liberty, and had actually served a notice of action on the magistrate on the 18th of May, when the *certiorari* was granted; which also disposes of the argument, that the magistrate being in jeopardy is no ground for the exercise of discretion in withholding the writ.

H. T. 1854.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 O'BRENNAN.

There is but one case which would at first sight appear to conflict with the cases I have referred to, as to that part of the order which directs a return of the informations and evidence—that is an *Anonymous case*.\* In that case the Court refused to order the examinations to be returned. But what is stated in that case is easily accounted for by the state of the law as it then existed. Upon a return to a *certiorari*, the magistrate was then bound to make up a conviction in full; he was bound to put on the face of the conviction all the evidence upon which he acted. No summary forms of conviction were at that time provided by the Legislature, such as were afterwards given, rendering it unnecessary to set out on the conviction more than directed by these forms; but that change in the law, made for that particular purpose, could not affect the right of the party to have all the proceedings stated, in order to take the opinion of this Court, where it is essential for that purpose to have the proceedings brought before the Court. That same view of the case in *Loft* is taken in *Paley on Convictions*, p. 301.

We are not now deciding on the validity of the magistrate's order. We merely decide that no magistrate can make an order against any of her Majesty's subjects, and yet say that he can withhold from a superior tribunal the documents and grounds upon which he has acted.

The case of *The Queen v. Lawless*, which was relied on, has no application to the present. In that case the Habeas Corpus Act had been suspended, and that was a sufficient reason for refusing the informations; and it would, indeed, be a matter involving most mischievous consequences, if a prisoner were allowed to come to this Court upon *mandamus*, not to enable this Court to have before it

\* Loft, 348.

H. T. 1854. any thing that might be required for its information, but to enable  
*Queen's Bench* the prisoner to find out who had given information against him, to  
 THE QUEEN use it for the very purpose of defeating it.  
 v.  
 O'BRENNAN. The rule for the *certiorari* must, therefore, be made absolute.

CRAMPTON, J., concurred.

MOORE, J.

I also concur; and I would but add that, on reference to the Crown Office Books, I find a case of *The Queen v. Blake*, in Trinity Term 1853, a prosecution under the Malicious Trespass Act, and all the documents connected with the case were brought into this Court, and discussed on the writ of the *certiorari*, and we quashed the conviction, because we thought, on the informations, the magistrate had no jurisdiction.



#### NESBITT v. M'MANUS.\*

Jan. 27, 28.

On an ejectment on the title, against an overholding tenant, it appeared in evidence that a lease had been made for three lives and thirty-one years, to be computed from the death of the surviving *cestui que vie*. The survivor was last heard of in 1814, and a notice to quit was served in October 1852:—*Held*, the presumption of the death was a question for the jury, and not a subject of direction.

EJECTMENT on the title, tried before Pigot, C. B., at the last Assizes for the county of Cavan.

Evidence was given at the trial, that one James Tuite demised the lands in question to one Samuel Charleton, for the lives of three persons, and the survivor of them, and a term of thirty-one years, to be computed from the death of the survivor. The lease bore date 30th of September, and reserved the rent, payable half-yearly on 1st of May and 1st of November—the first payment to be made 1st of November 1783. Evidence was also given, that the survivor of the persons named in the lease was reputed dead about 1815; but the exact date could not be fixed, the last time he was seen being about

\* FERRIN, J., *absente*.

the years 1813 or 1814. A notice to quit on 1st of May 1853 had been served on 8th of October 1852. H. T. 1854.  
*Queen's Bench*

On the close of the plaintiff's case, the defendant called on the learned Judge to nonsuit, or to direct a verdict for the defendant, on the grounds, first, that there was no evidence that the lease had expired; secondly, assuming that to be so, the notice to quit was insufficient, as the tenancy was to be taken to have commenced either from the day of the date in the lease, or from the death of the surviving *cestui que vie* (of which there was no evidence), or from the first gale-day after the date of the lease, 1st of November 1783. They also called on him to leave it to the jury to say whether the tenancy from year to year commenced on the 1st of May. NESBITT  
v.  
M'MANUS.

The plaintiff, on the other hand, called for a direction to the jury to presume that the surviving *cestui que vie* either died in 1815, or at farthest, before the beginning of 1821; and that the tenancy from year to year must be taken to have commenced on 1st of May, and that therefore they should find for the plaintiff.

His Lordship told the jury that they were to be satisfied on the evidence, whether the surviving life died in 1815, or whether they would presume his death seven years after 1814, which was the last period he had been heard of. In either event, if they were satisfied of the affirmative, they ought to find for the plaintiff. The jury found for the plaintiff.

An order *nisi* having been obtained, pursuant to leave reserved, to enter a nonsuit or a verdict for the defendant—

*Major* and *W. C. Henderson* (with them *Richardson*), showed cause.

*Macdonogh* and *J. C. Lowry*, contra.

The following authorities were relied on:—2 *Sm. L. C.*, p. 73; *Doe v. Watts* (a); *Lysaght v. Callinan* (b); *Roe, d. Jordan v. Ward* (c); *Berrey v. Lindley* (d); 1 *Fur. L. & T.*, p. 589; *Doe v. Samuel* (e); *Doe v. Johnson* (f).

(a) 7 T. R. 83.

(c) 1 H. Bl. 96.

(e) 5 Esp. 172.

(b) Hay. 152.

(d) 3 M. & Gr. 498.

(f) 6 Esp. 10.

H. T. 1854.

*Queen's Bench*

NESBITT

v.

M'MANUS.

LEFROY, C. J.

In this case, we are of opinion that the question as to the commencement of the tenancy was one for the jury, and not for the Judge. It is clear, that the tenant had a right to the full term of thirty-one years. The commencement of that term was to be calculated from the death of the surviving life in the lease; and after the expiration of that term, a tenancy from year to year arose. Whatever may be said of the legal commencement of that tenancy, it could not arise until the termination of the thirty-one years; but that termination must depend on its commencement, and that was a matter of fact, and not of law—namely, when the last life died. The plaintiff may have been unable to give in evidence the moment when the life died; but still, that question must be left to the jury. It is a presumption of a matter of fact, and not a presumption *de jure*: because the matter of fact is arrived at by presumptive evidence, that does not make it the less a matter of fact. The question therefore should have been left to the jury, and was not a matter of direction as a matter of law. The conditional order for a new trial must therefore be made absolute.

CRAMPTON, J.

Assuming the commencement of the tenancy to have been the 1st of May, it does not follow, as a presumption of law, that the commencement of the new tenancy was the same as the old. It has been decided, that if a tenant overholds, and the landlord receives rent, there is a contract for a yearly tenancy, that is, a new contract inferred from the acts of the parties. If the rent be paid on the same gale-days, the presumption is in favour of the commencement of the new tenancy at the same time; but that is a presumption of fact.

MOORE, J., concurred.

Order absolute, without costs.

H. T. 1854.  
*Queen's Bench*

## DOWLING v. SADLEIR.

Jan. 19.

J. D. FITZGERALD (with him *Lawless*) moved, on behalf of defendant, to change the venue, on special grounds, from the county of Carlow to an adjoining county. The action was brought for a conspiracy by the defendant and others to procure the arrest of the plaintiff, and thereby prevent him from exercising his right of voting as a freeholder for the county of Carlow. To ground the motion, it was sought to rely on an affidavit made by one Daniel Crotty (since deceased), in an action brought by the plaintiff against the said Crotty, for the recovery of damages for the same arrest for procuring which the present action was brought.

An affidavit made in another cause, in which the plaintiff in the present cause was also plaintiff—*Held*, inadmissible to ground a motion in the second cause.

The existence of political feeling or prejudice is no reason for a change of venue.

The affidavit was made for the same purpose as that for which it was now sought to be used. It stated that it was generally believed by the persons likely to compose the jury-panel, that the plaintiff was arrested to prevent him giving his vote for the conservative candidate, at an election for the county, and that the cause was looked on all through the county as a political trial; that various articles had been inserted in the only newspaper published in the county, stating the arrest of the plaintiff was illegal, and a gross outrage on the liberty of the subject, and that the proceedings of deponent were malicious and oppressive; and that the plaintiff was made the victim of a most diabolical persecution. It further stated that the jury-panel consisted of but sixty-two persons, most of whom were opposed to deponent in politics, and that the minds of the jurors were for the most part prejudiced against him, by those articles in the newspaper, which very much influenced the jurors of the county; and that in consequence of the excited state of the feelings of the persons composing the jury-panel, he believed that a fair and impartial trial could not be had.

*Whiteside* (with him *Macdonogh*), for the plaintiff.

This affidavit is inadmissible; it is not relied on in the notice of



H. T. 1854.  
*Queen's Bench*  
 DOWLING  
 v.  
 SADLEIR.

motion, and this Court has refused to allow the same affidavit to be used to ground two distinct applications, although the cause and parties were the same: 2 *Ferg. Prac.*, p. 1175; *Lessee Macartney v. Magrath* (a). *Langston v. Wetherell* (b) is the only case in which such an affidavit was allowed to be used. That was an application to grant a fiat; and Alderson, B., puts it on the true ground, that a proceeding to bail was a purely collateral proceeding, not a step in the cause: *Doe d. Gilbert v. Ross* (c); *Corry v. Wharton* (d).

*Lawless* replied.

LEFROY, C. J.

In this case, we are of opinion the affidavit cannot be relied on. The receiving it would be contrary, not merely to the rules and practice of the Court, and contrary to the rules of evidence, but it would be also injurious to the administration of justice. The Court cannot know the facts and circumstances under which the affidavit now sought to be used was made; and yet, we are called upon to allow it to be used in the present case. The parties to the several actions are different, and such evidence is inadmissible, unless the parties were the same, or persons deriving under them by legal representation. The case of *Langston v. Wetherell* is certainly an exception to that rule; but in that case, the affidavit was allowed to be used on an *ex parte* proceeding, and was not used to decide any rights of the parties, but for an entirely collateral object—that is not analogous to the present case. The application to change the venue is a question as to the plaintiff's right, and it is sought to deprive him of that right upon an affidavit made in another action, and by another person, and which, if the trial went on, would not be receivable in evidence.

Further, it would be dangerous to the administration of justice to allow this affidavit (being the affidavit of a deceased man) to be used, to affect the rights of others; for when thus offered, the obli-

(a) 1 Law Rec., N. S., 70.

(b) 14 M. & W. 105; S. C., 2 D. & L. 858.

(c) 7 M. & W. 102.

(d) 2 Scott, 436.

gation of an oath is in reality dispensed with, for no indictment for perjury could be sustained on it. Circumstances may certainly have occurred, which rendered it impossible for the defendant himself to have made the affidavit; it is, however, better that inconveniences should be submitted to, than that the law of evidence, or the settled practice of the Court, should be interfered with.

H. T. 1854.  
*Queen's Bench*  
 DOWLING  
 v.  
 SADLER.

CRAMPTON, J.

I have no difficulty in arriving at the same conclusion, that this affidavit is inadmissible. It is conceded it could not be read on the trial of this action, and that necessarily concedes it is not receivable upon motion. No case has been referred to, authorising the reception of such a document in evidence, unless that exceptional case of *Langston v. Wetherell*. The affidavit was there used on an application to grant a fiat, and was received merely for the purpose of satisfying the mind of the Judge before granting the fiat. A fiat may be made on evidence not strictly legal. It is only necessary, in such a case, that such evidence should be laid before the Judge as will satisfy his conscience.

Suppose two motions, made in two different cases, for an order that the plaintiff should give security for costs, grounded upon the same affidavit, the Court could not grant them, not upon an objection founded merely on the Stamp Act, but because it would appear that one order was made in one case without any document to warrant it.

I therefore see no ground for making this innovation, both on the practice of the Court and on principle.

MOORE, J.

The rule is expressly laid down in *Ferguson's Practice*, and I see no reason for departing from that practice. On principle, it would be injurious to the administration of justice to allow the reading of this affidavit.

*Fitzgerald* then moved for a postponement of the motion; but the Counsel for the plaintiff consenting to waive the objection to the affidavit, the Court disposed of the case on the merits.

H. T. 1854.  
*Queen's Bench*  
 DOWLING  
 v.  
 SADLEIR.  
 Jan. 21.

LEFROY, C. J., delivered judgment.

It is perfectly clear that this is a local action, and the plaintiff was bound therefore to lay the venue where the cause of action arose, or he would be nonsuited. It should be a very plain case to entitle the defendant to have the venue changed, where the action is local; because a suggestion must be entered on the record that a fair and impartial trial cannot be had in the place where the venue was laid; and the effect of entering such a suggestion would be to conclude the question between the parties. The case of *Rex v. Harris* (a) is decisive on the subject. The motion in that case was to change the venue from the city to the county of Gloucester, as the subject of the action arose out of the election for the borough; and Lord Mansfield says, "No two things can be more different than changing the venue, and continuing it as it was, with such a suggestion on the roll as is now proposed. In the Nottingham case, the motion was to change the venue; this is to enter a suggestion on the roll, with a *nient dedire*:" and again, "as the party cannot traverse such a suggestion, when entered by a rule of Court, there must be a clear and solid foundation for it."

Now, here is an action for a conspiracy to procure the arrest of a voter, and what great public interest is involved in it, calculated to enlist a general feeling on the part of the jurors? The matter arose within the borough of Carlisle; and because it is suggested that a feeling existed not against the present defendant, but against a man named Crotty, that is to be made the ground for the civil excommunication of the special jury of the whole county, there not being any special jury within the borough. Ought the county to be stigmatised upon any such allegation? Dennison, J., adds, in that case of *Rex v. Harris* :—"The Court will be cautious of admitting the entry of a suggestion which cannot afterwards be contradicted. But there ought to be the clearest evidence in the world, to ground such a suggestion upon; or it must arise out of the record itself."

If the existence of political prejudice were to be a ground for changing the venue, it would be difficult to find a place where a

(a) 3 Burr. 1330.

trial could be had. Wilmot, J., observes:—"The true rule about suggestions entered upon the record is, that the facts proving that a fair and impartial trial cannot be had in the ordinary course must be themselves suggested upon the record—whereas here it is only a conclusion without premises—it is only *supposed*, *conjectured*; they 'verily believe' that there cannot be a fair and impartial trial by a jury of the city. Nor in the nature of the thing can such a suggestion be credited. It does not follow that because a man voted on one side or on the other, he would therefore perjure himself to favour that party when sworn upon a jury."

What was to be suggested on the record? In that case there was the ingredient, the defendants pledging their oath that they could not have an impartial trial; and further, it was an application to remove a case from a city to a county; and the Courts are always favourable to the transfer of a trial from a limited to a more enlarged jurisdiction, and yet the Court refused to change the venue.

What are the facts upon which we are called upon to make this order? One year and a-half since, an action was pending between the plaintiff and another person named Crotty, and Crotty made an affidavit that he could not have a fair trial, in consequence of the political excitement raised by newspaper publications in the county. Certain passages were selected out of the newspaper in question, which might warrant the inference; but when the entire came to be read in detail, they turn out to be publications very far from publications indicating any malice against the present defendant. Further, these were published when that trial was about to take place; but we have no publication against the present defendant, nor have we his affidavit that he could not have a fair trial in Carlow; and yet it is sought to make use of an affidavit sworn one year and a-half ago, to induce us to arrive at the conclusion that there could not be found in the county of Carlow a jury to try a record of this personal character, and one not in any way involving party or political prejudices. Under these circumstances, we are of opinion the motion must be refused.

CRAMPTON, J.

I entirely concur in the rule pronounced by my LORD CHIEF

H. T. 1854.  
*Queen's Bench*  
DOWLING  
v.  
SADLER.

H. T. 1854. *Queen's Bench* JUSTICE, that the facts will not warrant the Court in coming to the conclusion that a fair trial cannot be had of this case in the county of Carlow.

DOWLING  
v.

SADLER.

There were two modes of changing the venue before the late Procedure Act—one by application to the Court, where the venue was transitory—the other by a suggestion on the roll, where the venue was local. It is unnecessary to decide whether this be a local action or not, as all personal actions are now placed on the same foundation; but, assuming it to be a local action, I see nothing to warrant the Court in granting this application. The affidavit of Crotty relates to a bye-gone transaction, founded on a paragraph not reflecting on the present defendant, and which has not been repeated; we, therefore, would not be acting according to the usual course of the Court and the law, if we acceded to the present application.

MOORE, J.

I am of the same opinion. It would at all times require a very strong and clear case to induce me to say that a fair trial could not be had in any county in Ireland. I would be slow to say that if a man were interested in a matter of a political and exciting description, he would, therefore, neglect his duty. This affidavit was made a long time since; but the decisive reason why I would not act on it is, that the Court are now called on to act on an affidavit which they before rejected.

LEFROY, C. J.

It must be considered that it was on consent of the parties that the affidavit of Crotty was read.

Motion refused, with costs.

H. T. 1854.  
*Queen's Bench*

## M'CLINTOCK

v.

## THE LONDONDERRY AND COLERAINE RAILWAY CO.

*Jan. 24.*

DEBT, on an award. The declaration stated, that disputes and controversies had arisen between the plaintiff and defendants, by reason of injuries and damages sustained or to be sustained by the plaintiff, by reason of trespasses committed on the lands of the plaintiff by the defendants, their workmen and servants, in and during the construction of a Railway of the defendants, through a portion of said lands, theretofore taken for the purposes of the said Railway; and for the quieting of said disputes and controversies, as well the plaintiff as the defendants did, to wit, on, &c., submit to the award, determination and judgment of M. L., R. B. and J. S., arbitrators chosen on the part of plaintiff and defendants, to arbitrate, award and determine of and concerning the claim of the plaintiff for compensation for injury and damages by reason of the trespasses, the plaintiff and the defendant thereby undertaking to abide by whatever award the arbitrators or the majority of them might publish, and pledging themselves that it should be carried into effect without delay; that the said arbitrators, having taken upon themselves the burthen of the arbitration, did afterwards, to wit, on, &c., duly make and publish their award in writing, of and concerning the matters in difference between the parties, and did thereby award and direct that the sum of £10 should be paid by the defendants to the plaintiff, for the trespasses already committed during the formation of the Railway, and that they should pay all costs incurred; that the costs so incurred amounted to £40, and that thereby an action had accrued to the plaintiff, to demand and have said sums of £10 and £40.

A declaration set out a submission, whereby the defendants undertook to abide by whatever award the arbitrators or the majority of them might publish, but it contained no averment that the defendants (who were a corporation) had contracted under their common seal to perform the award.

*Held*, that such would be intended, and that it was not necessary specially to aver that the submission was by deed.

The defendants specially demurred to this declaration, assigning as cause that they were a corporation, and being sued as such, the

H. T. 1854. *Queen's Bench*  
**M'CLINTOCK**  
*v.*  
**LONDON-  
 DERRY AND  
 COLERAINE  
 RAILWAY.**

submission stated in the declaration should have been averred to have been made by deed under their common seal; that it was not stated that such submission was made under any Act of Parliament; that profert was not made of the deed of submission; that such was but a parol submission, and the defendants had no power to bind themselves except by deed, and that no valid submission was shown on the declaration, authorising the award.

The plaintiff joined in demurrer, and the case was now argued by *W. C. Henderson*, in support of the demurrer.

The defendants are incorporated by a local and personal Act, 8 & 9 *Vic.*, c. 187, and are designated the Londonderry and Coleraine Railway Company. But though it be local and personal, it is to be taken as a public Act, and judicially noticed as such, and so the Court are bound to regard the defendants as a corporation: *Church v. Imperial Gas-light Company (a)*. Being a corporation, they could only contract under their common seal, and nothing on the face of this declaration intimates that the submission was by deed. *Com. Dig.*, tit. *Franchise*, F, 13; *Bac. Abr.*, *Corporation*, C, 3; *Watson on Arbitration*, p. 72; it is there said a corporation may submit to arbitration, but it must be by reference under their common seal.

Matters of a trifling character may be done by a corporation by parol without deed, but as a general rule, all the acts of a corporation must be by deed: *Mayer of Ludlow v. Charlton (b)*. The retainer of a servant, or the doing acts of frequent occurrence, such as would render the affixing of the seal inconvenient, from their insignificance, are exceptions to the generality of the rule. By the Lands Clauses Consolidation Act, 8 & 9 *Vic.*, c. 18, s. 25, a power is given to Railway Companies, in certain cases, to submit disputes respecting compensation to arbitration, and the arbitration is to be appointed under the hands of the promoters of the Railway, or any two of them, their secretary or clerk, and under the hand of the other party; and if such party be a corporation aggregate, under their common seal; and the appointment is to be delivered to

(a) 6 Ad. & Ell. 846.

(b) 6 M. & W. 815.

the arbitrator, and is to be deemed a submission to arbitration on the part of the party by whom the same shall be made. The 27th section provides for the appointment of an umpire, in case of disagreement of the arbitrators. It may be argued that under that 25th section, the submission stated in this declaration is good, but it is not so, for the submission authorised by that statute and section is of compensation for the purchase and severance of lands. The submission here is of disputes as to "trespasses," committed or to be committed. Nothing in the statute justifies a submission of trespasses to arbitrators. But the submission here is stated to have been referred to three arbitrators, whose award, or the award of the majority, was to be conclusive; whereas the statute (8 & 9 Vic., c. 18) says, in the event of differences among the arbitrators, an umpire is to decide. The plaintiff should have shown on his declaration that this submission was under the statute, and within its provisions; consistently with the declaration, this submission may have been by parol; a binding submission should be stated and proved: *Dilley v. Polhill* (a); *Biddell v. Dowse* (b); *Tilson v. The Warwick Gas-light Company* (c). In that case, on general demurrer, it was held that the Court would presume, in an action for work and labour against a corporation, that a deed existed; but such an inference will not be assumed on a special demurrer. *Atty v. Parish* (d); *Hodsdon v. Harridge* (e).

H. T. 1854.  
*Queen's Bench*  
**M'CLINTOCK**  
**v.**  
**LONDON-**  
**DERRY AND**  
**COLERAINE**  
**RAILWAY.**

*D. M'Causland and Napier, contra.*

It is not necessary that the declaration should contain a special allegation that the defendants entered into this submission by deed; for necessary circumstances implied by law need not be expressed in the pleading: *Co. Lit.* 303, b; *Com. Dig.* tit. *Pleader*, B, 2. "If a man pleads an act by a corporation, he need not allege a deed, for it shall be intended as if he makes cognizance as "bailiff to a corporation." The case of *The Dean and Chapter of Windsor v. Gover*, in 2 *Wms. Saund.*, p. 305, is directly in our

(a) 2 Stra. 922.

(b) 6 B. & C. 255.

(c) 4 B. & C. 962.

(d) 1 New B. 104.

(e) 2 *Wms. Saund.* 61.



H. T. 1854.  
*Queen's Bench*  
**M'GLINTOCK**  
*v.*

LONDON-  
 DERRY AND  
 COLERAINE  
 RAILWAY.

favour; for when it was decided, special demurrers were unknown, and it establishes that if a deed be necessary, the Court will imply its existence. *Bac. Ab., Corporation*. If a matter can be done in one way only, the Court will intend it to have been done in that way: *Throckmerton v. Tracy (a)*; *Edgar v. Sorrell (b)*; *Sheriffs of Norwich v. Bradshaw (c)*; *Peto v. Pemberton (d)*.

It is a mistake to say that a Railway Company have not power to submit their disputes, except under their seal by deed; for by the Companies Clauses Consolidation Act (8 & 9 Vic., c. 16, s. 97), it is provided that, with respect to a contract which, if made between private persons, would require to be in writing, and signed by them, the promoters of Companies may make such a contract on behalf of the Company in writing, signed by the committee, or by the directors, or any two of them, of the Company. If this submission could have been made by parol (and it is nothing but a contract) then this demurrer is bad, for the submission is only stated as a matter of fact, and no profert is made of it, and a general statement of it is sufficient.

*Henderson* replied.

The cases relied on by the plaintiff were cases of necessary indentments, such as livery of seisin being implied in feoffment—re-entry intended in a surrender: and besides, they were cases decided on motion in arrest of judgment, or at least not upon special demurrer. If the plaintiff sought to bring himself within the Companies Clauses Act, an averment to that effect should have been made in the declaration, something to show that the submission was in the nature of the contracts there referred to.

LEFROY, C. J.

The argument of Mr. *McCausland* is conclusive; he has put the case on an unanswerable ground. We must therefore overrule the demurrer.

(a) Plowd. 149.

(c) Cro. Eliz. 53.

(b) Cro. Car. 169.

(d) Cro. Car. 101.

H. T. 1854.  
*Queen's Bench*

RUSSELL v. KITCHEN.

Jan. 26.

**ASSUMPSIT**, on a promissory note.—The declaration averred that the note had been made at Capetown, Cape of Good Hope, on the 3rd of March 1850, for the sum of £170, and was payable to one William Pretchurch, or order, on the 3rd of September following, at No. 10 Strand-street, Capetown, and was indorsed by him to the plaintiff.

The defendant pleaded the general issue.

On the trial of the case before Pennefather, B., in last Michaelmas Term, in the Consolidated Nisi Prius Court, the plaintiff, who was the only witness, produced the note, and proved the handwriting of the defendant to it as maker, and also the handwriting of the indorsement; and that the note had been indorsed to him for valuable consideration, before maturity, he being then a resident merchant at Capetown. He further proved a presentment by himself, at the place and on the day mentioned in the body of the note, and that by the custom of merchants at the Cape, the usual days of grace are not allowed.

On the close of the plaintiff's case, Counsel for the defendant called for a nonsuit, on the ground that, inasmuch as the statute 9 G. 4, c. 24, whereby promissory notes were made in Ireland negotiable securities, did not extend beyond the limits of that country, that no action could be maintained here by the indorsee against the maker of a note made and payable in another country, out of the jurisdiction, and especially where, as in the present case, the indorsement had also been made out of the jurisdiction, the promissory note being in such a case a mere *chose in action*, and not transferable out of this country: his Lordship refused to nonsuit, and directed a verdict for the plaintiff, reserving liberty for the defendant to move to have this verdict set aside, and a verdict entered for the defendant.

Another objection was raised on the part of the defendant—

Where a party is sued on a contract made in a foreign country, the Court will presume it is a legal contract according to the law of that country, unless the contrary be proved; and the onus of such proof lies upon the party objecting to its legality.

H. T. 1854. *Queen's Bench*  
*RUSSELL*  
*v.*  
*KITCHEN.* namely, that the plaintiff should have proved presentment at the place specified in the body of the note, on the last of the days of grace, and that the evidence of the particular custom of merchants at the Cape could not have the effect of dispensing with the proof of presentment in the usual way.

An order *nisi* having been obtained to set aside this verdict, pursuant to the leave reserved—

*Rolleston* (with him *Brereton*) showed cause.

*Falkiner* and *Griffin*, contra.

The defendant is entitled to a new trial, as the plaintiff was bound to have allowed the customary days of grace, before the presentment of the note for payment. We do not contend that this note is incapable of being sued on in this country if the parties were within the jurisdiction; but to make it an available security, the plaintiff ought to have declared specially upon it. He should have averred that by the local law of the Cape, such an instrument is a negotiable security, and should have proved that averment at the trial, as the Court will not take official notice of foreign law: 1 *Chit. Pl.*, p. 247; *Ashley v. Fisher* (a). The statute makes promissory notes negotiable, assignable and capable of being sued on, as inland bills were by the custom of merchants; that could not extend to foreign bills. But if the statute does apply to foreign bills, the party suing on them must be bound by the obligations of it. He should have allowed the defendant the three days of grace, in accordance with the custom of merchants in this country: *Brown v. Harrenden* (b); *Bentley v. Northhouse* (c); *Carr v. Shaw* (d); *Bayly on Bills*, p. 28 (1st ed.). Lord Kenyon expressly gave his opinion for our proposition, in a case which came before him on demurrer. And no action was ever maintained on a promissory note, except it had either been made in England, and thus had been within the statute in its inception, or, though originally foreign, had been brought within the statute by indorsement. The case of *De La Chaumette v. The Bank of England* (e)

(a) 12 Jur. 1051.

(b) 4 T. R. 148.

(c) M. & Mal. 66.

(d) B. R. Hil. 39 G. 3.

(e) 2 B. & Ad. 385.

is merely an instance of the first of these exceptions. *Trimbey* H. T. 1854.  
*v. Vignier* (a), instead of being an authority for the plaintiff, is *Queen's Bench*  
 in our favour. There a French note was sued upon in England, *RUSSELL*  
 and although, supposing it to have been an English note, the action *v.*  
 would have been maintainable, yet the plaintiff, having failed in a *KITCHEN.*  
 particular which the French laws held essential, the Court directed  
 a verdict for the defendant, which it could not have done if the  
 English statute, whose requirements the plaintiff had obeyed, ex-  
 tended to the foreign note. The point was raised in *Trimbey v.*  
*Vignier*, such as has arisen in the present case; the declaration  
 seems to have been generally as on an English note, but was  
 not objected to, there being another valid objection to the action.

*Brereton* replied.

*Cur. ad. vult.*

CRAMPTON, J.\*

This was an application for a nonsuit, or a new trial, pursuant to leave reserved. The action was on a promissory note by the indorsee against the maker.—[His Lordship, having stated the facts, proceeded to say]:—

With respect to the first question—namely, that no title passed to the plaintiff under the instrument—the defendant alleging that it was a mere *chose in action*, and not indorsible under the statute: the established rule of law is, that the *lex loci contractus* regulates the terms of the contract itself, and the *lex fori* regulates the mode of suing on it—so the law is laid down by Tindal, C. J., in *Trimbey v. Vignier*; therefore, if this instrument gave title to sue at the Cape, it would also entitle the plaintiff to sue in Ireland; and on the other hand, if there was no title to sue at the Cape, then he could not sue here.

The question then is, whether this instrument was legal, according to the law of the Cape? We have no evidence of that—the only thing having the appearance of such evidence is, that it is

(a) 1 Bing. N. C. 151.

\* This case was argued in Chamber, the CHIEF JUSTICE and PERRIN, J., being engaged in Court on other business; the argument is therefore *ex relatione*, but the judgment was delivered in full Court.

H. T. 1854.  
*Queen's Bench*  
 RUSSELL  
 v.  
 KITCHEN.

payable to order on the face of it; how far that is evidence, it is unnecessary to say. Are we to assume that the indorsement was void, or should we not presume the contrary, in the absence of any evidence on the subject? The question then comes to this—whether the *onus probandi* lies on the plaintiff or defendant? It is plain that a party relying on the law of a foreign country is bound to prove what that law is. *Brown v. Gracey* (a) is an express decision on that point. The effect of that decision is this, that in the absence of all evidence as to the law, we are to presume that the law of the foreign country is conformable to the law of England, and not the contrary. That decision, therefore, rules the first point. A distinction was attempted to be taken between the statute of *Anne* and the Common Law; but both are equally imperative. I therefore cannot admit that distinction. This point, therefore, must be ruled in favour of the plaintiff.

The other point is that no days of grace had been allowed. But the note was duly presented on the day it became due; and we have evidence that, according to the custom of the Cape, no days of grace are allowed; we are bound, therefore, to apply the law of the country in that respect to this case. The verdict must stand.

MOORE, J.

I fully concur with my Brother CRAMPTON. With regard to the days of grace, they form part of the law of the country by the operation of, and are to be regulated by, the custom of merchants; and it has been proved there is no such custom at the Cape.

On the other point, it is plainly in favour of the plaintiff, both on principle and authority. The note was made payable to the payee or order, and it must be presumed to have been made according to the law of the country where it was made; therefore the plaintiff is not to be called on to prove what was the law of the country—the onus lay upon the defendant, showing it was made contrary to that law; and he not having done so, the plaintiff is entitled to recover.

Cause allowed, with costs.

(a) 1 D. & R., N. P. Cas., 41 n.

H. T. 1853.

Exch. Cham.

## Exchequer Chamber.\*

JOHN JONES, Lessee of GEOFFRY DAVIES,

v.

JAMES D'ARCY.

(Error from the Court of Queen's Bench).

1852.

Nov. 10, 17.

1853.

Jan. 26.

THE case was argued in Michaelmas Term 1852, by *Isaac O'Callaghan* and *J. D. Fitzgerald*, for the plaintiffs in error, and *Henry Martley* and *Alexander Graydon*, for the defendant.

The facts of the case, and arguments relied on, appear in the judgment of the Court.

In Hilary 1806, A, being under a settlement made in 1769, tenant for life of thirteen denominations of land, with remainder to B

in tail male, remainder to N in tail male, A and B joined in a recovery; and by deed of the 9th of March 1806, executed by A, B and R., it was declared that the recovery was to be to the use of B and his heirs, but that he was forthwith to execute to R. a mortgage in fee of some of the lands in the recovery, to secure a debt due from A to R.; and by deed of mortgage of the same date, A and B conveyed (by lease and release) seven of the thirteen denominations to R. in fee, subject to redemption, &c. B died in January 1809 without issue, leaving N (the next remainderman under the settlement of 1769) his heir-at-law. A died in 1816. N., having been in possession from the death of A in 1816, died in 1848, leaving the lessor of the plaintiff his eldest son, who claimed all the lands as heir in tail under the remainder to N. in the settlement of 1769. In 1810, N., by settlement on his marriage, after reciting (as if the recovery of 1806 had been in fact duly suffered) the declaration made by the first deed of the 9th of March 1806, of the uses of the recovery thereby recited to have been duly suffered, and without any further recital relating to the title, conveyed (by lease and release) all the lands comprised in the deed, declaring the uses of the recovery, including those in the mortgage, to R., to the use of himself for life, remainder to his first and other sons in tail male. N. never levied a fine or suffered a recovery. The recovery of 1806 had, down to the passing of the Act for the Abolition of Fines and Recoveries (4 & 5 W. 4, c. 92), been invalid as to some of the denominations in the mortgage to R., because though named in the deed making the tenant to the præcipe, they were not named in the recovery itself; and as to others of the mortgaged denominations, because the tenant to the præcipe was not made by C., in whom the legal freehold was outstanding, under a deed of 1799, whereby A's life estate in such of the lands as were comprised in that deed was assigned to C and his heirs, in trust, to make certain annual and other payments out of the rents, and to pay any surplus to A. Held, reversing the judgment of the Court of Queen's Bench, that at the time of the passing of the Act (August 1834), N. was in possession of the lands "in respect of an estate which the recovery, if valid, would have barred," within the meaning of those words in the 9th section of the Act; and that therefore the above defects in the recovery were not cured by the 5th and 6th sections; and the lessor of the plaintiff was entitled to recover the lands in the mortgage to R.—[*Dissentientibus*, PIGOT, C. B., PENNEFATHER, B., and MOORE, J.]

\* *Absentibus*, RICHARDS, B., and JACKSON, J.

H. T. 1853. The following authorities were cited on behalf of the plaintiff  
*Exch. Cham.* in error: *Littleton*, ss. 598, 599, 600; *Took v. Glascock* (a);  
 DAVIES *Machil v. Clark* (b); *Loyd v. Carew* (c); *Machil v. Clark* (d);  
 v. *Goodright v. Mead* (e); 5 *Cruise Dig.*, p. 351; *Doe d. Neville v.*  
 D'ARCY. *Rivers* (f); *Doe d. Gregory v. Whichelo* (g); *Doe v. Oliver* (h).

For the defendants in error: *Co. Lit.*, p. 326, b; *Stapleton*  
*v. Stapleton* (i); *Lloyd v. Lloyd* (k); *Bensley v. Burdon* (l);  
*Carpenter v. Buller* (m); *Wiles v. Woodward* (n).

The Court, differing in opinion, delivered judgment *seriatim*.

GREENE, B.

H. T. 1853. This is a writ of error from a judgment pronounced by the Court  
*Jan. 28, 27.* of Queen's Bench.\*

It was an ejectment on the title, tried before Blackburne, C. J., in the Sittings after Trinity Term 1850, to recover possession, amongst others, of seven denominations of lands—namely, Creavroe, Lissalavane, Cappagh, Eskeragh, Boganes, Derrykipt and Kilclough, of which lands, on the 18th of April 1769, Geoffry Davies (since deceased) was seised in fee. The demise was laid on the 1st of March 1850.

The case came before the Court upon a special verdict, by which it appeared that Geoffry Davies (the first) being seised in fee of the above denominations of land, by indentures of lease and release of the 19th of April 1769 (executed previously to the mar-

(a) 1 Saund. 235, b note.

(b) 2 Salk. 619; S. C., 7 Mod. 18. (c) Com. Rep. 19.

(d) 2 Lord Ray. 778; S. C. Holt, 615; 11 Mod. 19.

(e) 3 Bac. Abr. 693; S. C., 3 Bur. 1703.

(f) 7 T. R. 276. (g) 8 T. R. 211.

(h) 5 M. & Ry. 202; S. C., 2 Sm. L. C., 417.

(i) 1 Atk. 9. (k) 2 D. & War. 369.

(l) 2 S. & St. 519; S. C., 5 Rus. 352.

(m) 8 M. & W. 209. (n) 5 Exch. 557.

\* See 2 Ir. Com. Law Rep. 163.

riage of his son Thomas Davies the elder and Honoria O'Connor), conveyed all the said lands to Edmond Kelly and John Leonard, their heirs and assigns, to the use of the settlor Geoffry Davies (the first) for life, remainder to the use of his son Thomas Davies (the elder) for life, remainder to the use of the first and other sons successively of said marriage, in tail male, with divers remainders over. This settlement was registered in 1769.

H. T. 1853.  
*Exch. Cham.*  
DAVIES  
v.  
D'ARCY.

The marriage took effect, and there was issue of it four sons, Geoffry Davies (the second), Thomas Davies (the younger), Netterville Davies, Joshua Davies, and three daughters, Mary (who married a person named Bryan Duane), Belinda and Eleanor. Geoffry Davies (the first) was in possession until his death in 1777, and thereupon Thomas Davies (the elder) entered into possession, and he died in 1816.

It is not expressly found that he continued in possession until his death, but it may be so inferred.

Geoffry Davies (the second) died in 1780, under age and without having been married. Thomas Davies (the younger) came of age before 1803, and died in 1809 in his father's lifetime, without being married. Netterville Davies, on the 5th of March 1810, married Eleanor Cruise, and of this marriage there was issue the lessor of the plaintiff, Geoffry Davies (the third). Netterville Davies, from the time of the death of his father Thomas (the elder) to the time of his own death, was in possession or receipt of the rents and profits of the lands. He died in 1848, leaving the lessor of the plaintiff his eldest son and heir-at-law.

Upon his birth, he became issue in tail inheritable under the settlement of 1769, and would, if nothing occurred to bar the entail thereby created, become entitled, as tenant in tail, after the death of his grandfather Thomas Davies (the elder) and his father Netterville.

The special verdict then finds that, by indenture of the 30th of July 1799, between Thomas Davies (the elder) of the first part, Roderick O'Connor of the second part, Honoria Davies (otherwise O'Connor) of the third part—reciting that Thomas Davies (the elder) was seised of an estate for life, amongst others, of the lands



H. T. 1853.  
*Each. Cham.*

DAVIES  
 v.  
 D'ARCY.

of Cappagh, Boganes, Kilclough, Elmsfort and Creavroe; and that for the purpose of the payment of his debts, and to provide for his younger children, he had agreed to convey the said lands to Roderick O'Connor—It was witnessed that Thomas Davies (the elder), in consideration of said agreement, and of the sum of £100, conveyed to Roderick O'Connor the said lands, *Habendum* during the life of said Thomas Davies (the elder), in trust out of the rents and profits to reimburse himself the sum of £100, and then to pay thereout during his life to Thomas Davies (the elder) an annuity of £100, and as to the residue of the rents and profits, to pay thereout to Honoria Davies, Thomas Davies (the younger), Netterville Davies, Joshua Davies, Belinda Davies and Eleanor Davies, the annual sum of £320 for their maintenance and support; and after payment of the said annuities, then to apply the residue of the rents and profits to the discharge of the debts of Thomas Davies (the elder).

The deed contained a covenant by Roderick O'Connor to pay these annuities, and that he would, after the payment thereof, apply the residue to the discharge of the debts of Thomas Davies (the elder), and after same were discharged he would pay the residue to Thomas Davies (the elder). It contained also a clause providing for the contingency of an increase in the amount of the rents, and a restriction upon Roderick O'Connor's power to let. It was registered on the 15th of November 1799. Soon after its execution, Roderick O'Connor was for two years and a-half in receipt of rent out of the lands comprised in this deed.

I have already observed that the verdict does not expressly find that Thomas Davies (the elder) continued in possession until his death in 1816; but it may be inferred that he resumed the possession after the trustee ceased to receive the rents. There can be no doubt that under the deed of 1799, the legal estate in these five denominations was vested in the trustee during the life of Thomas Davies (the elder.)

In this state of things it appears that Thomas Davies (the elder) and Thomas Davies (the younger), then his eldest son and the first tenant in tail under the settlement of 1769, contemplated

the barring of the entail; and with that view, on the 8th of February 1806, there was executed by Thomas Davies (the elder) an indenture of bargain and sale, expressed to be made between Thomas Davies (the elder) and Honoria his wife of the first part, Thomas Davies (the younger) of the second part, James Smith of the third part, and William Thomas of the fourth part; whereby it was witnessed that Thomas Davies (the elder) and Honoria his wife, in consideration of ten shillings, and for docking all estates tail in, amongst others, the lands of Creavroe, Lissalavane otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe and Kilclough, granted to James Smith, his heirs and assigns, the said lands, to the intent that he might be tenant of the freehold for the suffering of a recovery or recoveries which should enure to such uses as should be declared by a deed to be executed on or before the 1st of April 1806 by Thomas Davies (the elder) and Honoria, Thomas Davies (the younger) and Richard D'Arcy. This indenture of the 8th of February 1806 was not enrolled.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

In Hilary Term (46 G. 3) 1806, a recovery was suffered, amongst others, of the lands of Creavroe, Cappagh, Eskeragh, Boganes and Kilclough, in which William Thomas was defendant, James Smith the tenant, and Thomas Davies (the elder) and Honoria his wife, and Thomas Davies (the younger), were vouchees.

This recovery, if valid, would have barred the estate tail in remainder of Thomas Davies (the younger), and also the remainder in tail of Netterville Davies; and consequently defeated any title of the present lessor of the plaintiff as his issue in tail. In point of law, however, the validity of the recovery was questionable. First, because the deed of the 8th of February 1806, being by way of bargain and sale, was not enrolled—(this defect applies to the whole seven denominations). Secondly, because the recovery omitted two denominations—viz., Lissalavane otherwise Elmsfort, and Derrykipe. Thirdly, inasmuch as Roderick O'Connor, not having joined in the deed of February 1806, there was no legal tenant to the præcipe.

H. T. 1853.

*Esch. Cham.*

DAVIES

v.

D'ARCY.

On the 9th of March 1806, by indenture expressed to be executed between Thomas Davies (the elder) and Honoria Davies of the first part, Thomas Davies (the younger) of the second part, Netterville Davies, Joshua Davies, Belinda Davies and Eleanor Davies of the third part, Richard D'Arcy of the fourth part, and William Smith of the fifth part, being the deed referred to in the deed of 8th of February 1806 as intended to be executed for that purpose, reciting certain articles of agreement of 19th of July 1803, by which Thomas Davies (the elder), Honoria Davies and Thomas Davies (the younger), for the considerations therein mentioned, had assigned to Richard D'Arcy the lands of Creavroe, Lissalavane otherwise Elmsfort, Cappagh, Eskeragh, Boganea, Kilclough and Derrykipe; *Habendum* to Richard D'Arcy, his executors and administrators, for eleven years from the 1st of November 1806, in trust to pay certain annuities therein specified, and that Thomas Davies (the younger) should, during such term, hold in his own hands the lands of Cloonsherry; the surplus rents, after payment of said annuities (save as to the lands of Cloonsherry), to be applied by Richard D'Arcy, during said term, in payment of certain debts of Thomas (the elder) and Thomas (the younger); and so soon as said debts should be satisfied, the lands should vest in Thomas Davies (the younger), subject to the annuities; and that by these articles of 19th of July 1803, Thomas Davies (the elder) and Thomas Davies (the younger) had covenanted with Richard D'Arcy to levy fines and suffer recoveries of Cappagh and Kilclough. The indenture of the 9th of March 1806 further recited, that, owing to mistakes in the articles, the proposed fine and recovery had not been completed; that Richard D'Arcy had, for the benefit and at the request of Thomas Davies (the elder) and Thomas Davies (the younger), made advances to the amount of £567. 16s. 7d., and that the parties to the deed had agreed to put an end to the arrangement made by the articles of 19th of July 1803, and that Thomas Davies (the elder) should surrender his life estate in the lands to Thomas Davies (the younger), his heirs and assigns, and that a recovery or recoveries should be suffered of Kentstown otherwise Cloonfinogue, Cloonsherry, Creavroe, Lissalavane other-

wise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe and Kilclough, to the use of Thomas Davies (the younger), his heirs and assigns, but subject to the sums due to Richard D'Arcy, and subject to certain annuities to Thomas Davies (the elder) for his life, to a trustee, for the separate use of Honoria Davies, to Netterville Davies and Joshua Davies respectively; and reciting that a recovery of the above mentioned lands had been suffered, except those of Ballinacor and Cloonkeen, of which Thomas Davies (the elder) still stood seised of an estate for life. The indenture then witnessed that the matters in the articles of 19th July 1803 were to cease and be void, and that for the considerations therein, Ballinacor and Clonkeen were thereby surrendered by Thomas Davies (the elder) to Thomas Davies (the younger); and it was thereby declared that the recovery recited to have been suffered in Hilary Term 1806 should enure to the use of Thomas Davies (the younger), his heirs and assigns, subject to, and charged with, the sum due Richard D'Arcy, for which Thomas Davies (the younger) was to grant D'Arcy a mortgage of certain lands in that recovery, and subject to the annuities provided for Thomas Davies (the elder), Honoria Davies, Netterville Davies and Joshua Davies respectively; and it further witnessed that Thomas Davies (the elder), under a power in the settlement of 19th April 1769, did thereby appoint portions for his younger children, subject to a proviso for their executing this deed. The indenture then set out a covenant by Thomas Davies (the younger) for payment of the annuities, and a declaration that as to the lands to be mortgaged to Richard D'Arcy, this recovery suffered was to enure to the use of Richard D'Arcy, his heirs and assigns, when he should become mortgagee thereof, and a covenant by D'Arcy to surrender the leases he held of the lands of Cloonsherry and Kentstown, immediately upon the execution of the mortgage, and bond and warrant collateral. There was a further covenant of Thomas Davies (the elder) and Thomas Davies (the younger) with Richard D'Arcy, for further assurance to secure his demand, and a covenant by all the parties for further assurance.

This indenture of 1806 was not executed by any of the persons named as parties, except Thomas Davies (the elder), Honoria Davies,

H. T. 1853.  
*Esch. Cham.*

DAVIES  
v.  
D'ARCY.

H. T. 1853. Thomas Davies (the younger) and Richard D'Arcy. It was registered on the 10th of March 1806.

*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

Immediately after its execution, a mortgage was made by Thomas Davies (the elder) and Thomas Davies (the younger), to Richard D'Arcy, whereby, to secure the debt due to D'Arcy, they (by lease and release) conveyed to Richard D'Arcy, his heirs and assigns, Creavroe, Lissalavane otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe and Kilelough; *Habendum* unto and to the use of Richard D'Arcy, his heirs and assigns, subject to redemption. This mortgage was registered on the 10th of March 1806.

The special verdict further stated that by an indenture of release, bearing date the 4th of March 1810, made previously to and in contemplation of the marriage of Netterville Davies and Eleanor Cruise, and expressed to be between Netterville Davies of the first part, Mary Cruise and Eleanor Cruise of the second part, Richard Burke and Simon Fallon of the third part, Roderick O'Connor and James Burke of the fourth part, whereby, after reciting that by indenture of the 9th of March 1806, it was recited that a recovery had been duly suffered, Hilary 1806, of, &c. [naming the lands which that deed had recited to have been in the recovery], and that by that deed, Ballinacor and Clonkeen had been surrendered, and the uses of the recovery declared as above stated, and without any further recital in relation to the title to the estate, it was witnessed that Netterville Davies, for the considerations therein, granted to Burke and Fallon, and their heirs and assigns, Kentstown otherwise Cloonfinogue, Cloonsherry, Creavroe, Lissalavane otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe, Kilelough, Kilcourse and Killahouse, to the use of Netterville for life, remainder (subject to a jointure for Eleanor) to the use of the first and other sons successively of Netterville and Eleanor in tail male.

On the death of Netterville Davies in 1848, the defendant James D'Arcy entered, and had since continued in possession of all the lands in the declaration. Geoffry Davies (the third) was the plaintiff.

The special verdict further stated a consent order that, although the lands were in Galway, the venue should be laid in Dublin.

Upon this special verdict the Court below gave judgment for the

lessor of the plaintiff, as to certain of the denominations claimed ; and for the defendant as to certain others. On this judgment a writ of error has been brought in the name of the feigned lessee, seeking to reverse the judgment as regards these last several denominations.

H. T. 1853.  
*Esch. Cham.*

DAVIES  
v.

D'ARCY.

It is contended on the part of the plaintiff in error, that judgment should have been given for him for these denominations, or at least some of them, as well as for the others, in respect of which he has obtained judgment. And his case is, that he is entitled as tenant in tail under the settlement of 1769, that entail not having been duly barred by the recovery of 1806. With respect to two of the denominations in question, viz., Lissalavane and Derrykipe, he says the recovery was invalid, inasmuch as those two denominations (though comprised in the deed of 8th February 1806, making the tenant to the præcipe) were not included in the recovery itself. That as to the other lands, though they are comprised in the deed making the tenant to the præcipe, and in the recovery, yet the recovery is invalid, because the deed, making the tenant to the præcipe, had not been duly enrolled. He further says, that as to all the denominations save two, viz., Derrykipe and Eskeragh, they were conveyed by the deed of the 30th of July 1799, to Roderick O'Connor, who thereby had the freehold, and that he did not join in the deed making the tenant to the freehold. These several objections, if not satisfactorily answered, extend to all the denominations, and would entitle the plaintiff in error to judgment. The defendant in error does not dispute this, but contends, that by virtue of 4 & 5 W. 4, c. 92, these objections, which would otherwise be fatal to the recovery, have been cured, and the recovery validated. The plaintiff in error says, that the Act has not the effect, as against him, of giving validity to the recovery.

The question then for our consideration is, whether, as between the plaintiff claiming under the settlement of 1769, and the defendant relying upon the Act, the recovery is, upon the facts stated, to be held as having been retrospectively validated, by the operation of the Act of 4 & 5 W. 4, c. 92?—[His Lordship read sections 5, 7 and 8 of the Act.]

It is admitted that the effect of these several enactments is to

H. T. 1853.  
*Exch. Cham.*  
DAVIES  
v.  
D'ARCY.

remove the various objections relied upon, unless the recovery in question is excluded from the operation of the Act, by the 9th section. The 9th section provides that the Act shall not retrospectively validate a defective recovery; first, where the recovery has been in fact wholly or partially reversed; secondly, where any person who would have been bound by the recovery, if valid, had before the passing of the Act any dealing with the lands on the faith of the invalidity of the recovery; thirdly, where any person was, at the passing of the Act, in possession of the lands, in respect of any estate which the recovery, if valid, would have barred; fourthly, where before the Act a Court has refused to amend; fifthly, where proceedings were pending at the passing of the Act, in which the validity of the recovery was in question between the party claiming under the recovery and the party claiming adversely to it.

The principle of all these exceptions appears to be the same, viz., to prevent the *ex post facto* validation of the recovery from working injustice.

It is upon the third of these exceptions that the question turns. The effect of validating the recovery in the case there provided for would be to bar the estate in respect of which the party was in possession, and thus defeat such possession, by letting in the recovery. This was the injustice which it was intended to obviate.

The defendant, who is obliged to rely on the 5th, 7th and 8th sections, contends, that they are not controlled in this case by the 9th section, because, on the 15th of August 1834 (the passing of the Act), no person was in possession in respect of any estate which the recovery of 1806, if originally valid, would have barred. On the other hand, the lessor the plaintiff, claiming under the settlement of 1769, contends that the person in possession on the 15th of August 1834, was so in possession in respect of an estate, which the recovery of 1806, if originally valid, would have barred.

It is remarkable that although everything depends on the nature of the possession on that day, the verdict does not directly find who was then in possession; nor in respect of any estate, whether really and in fact, or claimed by such person. It is however to be inferred

from the different findings, that Netterville Davies was the person then in possession. H. T. 1853.  
*Esch. Cham.*

This being assumed, we are to consider and to decide, as between the parties on the record, what the estate was, in respect of which he was in possession? The lessor of the plaintiff alleges, that that estate must be held to be the remainder in tail to which Netterville Davies was entitled in 1810, when he executed the deed of that date, that being the only estate which in point of fact and right he then had, because no recovery then existed to bar that estate. The defendant contends, that the estate which Netterville Davies had was an estate for life, derived out of the reversion in fee which descended to him upon the death of his elder brother, Thomas Davies (the younger), in 1809, without issue; or, at all events, that he must be taken to have been in possession in respect of that estate, which estate would not be barred, but on the contrary would be validated, by the recovery. Netterville Davies had no estate in possession until 1816. Upon his father's death in that year he entered.

The argument below, in favour of the plaintiff, seems to have been grounded on the supposition of a remitter; viz., that Netterville Davies having in 1810 a defeasible title, and afterwards, upon the death of his father, having become entitled as tenant in tail, he was then remitted to his elder and better title, viz., his tenancy in tail. A sufficient answer to this argument appears to have been given by the Chief Justice below, viz., that supposing that in 1816 no act had been done by Netterville Davies, he had not two estates, viz., a defeasible and an elder and better title, but only one estate, the remainder in tail under the settlement of 1769. And if the deed of 1810 is to be regarded, yet still there could be no remitter as to Netterville Davies against his own act in 1810, which made him tenant for life only; that is, he was guilty of folly, as expressed in *Co. Litt.* 347, *b.* If, therefore, the right of the present claimant depended upon the question whether in 1816 Netterville Davies himself was remitted to his estate tail under the settlement of 1769, it must be admitted that he must fail.

But does the right of the lessor of the plaintiff depend upon the

DAVIES  
v.  
D'ARCY.



H. T. 1854.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

question whether Netterville Davies was or was not so remitted? I apprehend not; for it may be conceded that Netterville Davies could not be considered as remitted by reason of his own folly, and yet that as between his issue in tail (the lessor of the plaintiff), and those deriving under him, he may be, and ought to be, considered as having a possession in respect of his original estate tail. To show that the case of the issue in tail is different in this respect from that of the party guilty of the folly, it will be enough to advert to the distinction made in the doctrine of remitter. For example, Netterville Davies' entry in 1816 could not have re-vested his estate tail, nor remitted him; yet if, upon his death, the present lessor of the plaintiff had entered, he would have been in of his old remainder in tail, and remitted to it, though he might also have been entitled under the deed of 1810. Thus in *Litt.*, section 682, it is laid down:—"Also, if tenant in tail have issue two sons of full age, and he letteth the land tailed to the eldest son for term of his life, the remainder to the younger son for term of his life, and after the tenant in tail dieth; in this case the eldest son is not in his remitter, because he took an estate of his father. But if the eldest son die without issue of his body, then this is a remitter to the younger brother, because he is heir in tail, and a freehold in law is escheated and cast upon him by force of the remainder, and there is none against whom he may sue his action." In like manner it is laid down in 1 *Roll. Rep.*, 260:—"So, if tenant in tail make a feoffment to the use of himself in fee, or to the use of himself for life, remainder to B for years, and does not dispose of the reversion; in either case the issue is remitted, though the tenant in tail himself is not." So in *Co. Litt.*, 353, b:—"If husband and wife be tenants in special tail, and they levy a fine at the Common Law, and after the husband and wife take back an estate to them and their heirs, in this case the estate tail is not barred; and yet against a fine levied by herself she cannot be remitted, because thereupon she was examined." These authorities show that the folly of the ancestor does not prejudice the right of the issue in tail, and that he may be remitted, though the ancestor could not.

Assuming then that Netterville Davies did not, and could not be considered, when he entered in 1816, to have an estate by remitter, that is, to be in of the old estate tail; then the question is, what was the estate to which his possession is to be referred? or, with reference to the present inquiry, was it or was it not an estate which would have been barred by the recovery of 1806, if it had been valid? This depends upon the effect of the deed of 1810. The findings with respect to that deed are very vague and unsatisfactory. As stated, it recites the deed of the 9th March 1806 as reciting the recovery, and that by the deed of the 9th of March 1806, certain uses were declared; and then without further allusion to title, Netterville Davies grants to trustees to the use of himself for life, remainder to the first and other sons of the marriage in tail. It does not state the death of Thomas Davies (the younger), or that Netterville Davies was his heir, nor in what way Netterville Davies was entitled, or what estate he had, nor are these facts found by the jury. Some doubt may be entertained, whether upon such a verdict the Court is in a condition to pronounce a judgment. But enough appears to enable the Court, as a matter of law, to draw an inference as to Netterville Davies' title. It must, I think, be taken that Netterville Davies acted upon the supposition that the recovery was valid, and considered himself to be owner in fee as heir to his brother. This, however, was not the case in point of law. He was then (in 1810) only tenant in tail in remainder, and the effect of his grant by lease and release was merely to create a base fee, defeasible by his issue. It had not the effect of a discontinuance, and would not have tolled the entry of the issue, because a tenant in tail in remainder cannot discontinue: *Doe v. Jones* (a). And even if he were tenant in tail in possession, his lease and release, being an innocent conveyance, would not work a discontinuance: *Machil v. Clark* (b); *Heywood v. Smith* (c). Suppose then the deed of 1810 had not referred to a recovery, or contained any recital, but Netterville Davies had simply conveyed by lease and release, this would have

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

(a) 1 B. & C. 238.

(b) Comyn Rep. 120.

(c) 1 Bulst. 165.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

created a base fee, derived out of the estate tail, it would have been a grant of what the grantor had. The grantee would have derived through the grantor, and represented his estate, subject to all charges upon it. He would not have obtained a title paramount or behind that of his grantor: *Seymour's case* (a); *Mackil v. Clark* (b). Therefore, the base fee, being derived out of the estate tail, whatever would bar the estate tail would bar the base fee, and all estates derived out of it, or depending upon it: *Capel's case* (c); *Cholmondely's case* (d). Now I admit that the possession which Netterville Davies had in 1816 (and which it is to be presumed was not affected by any thing which intervened between 1816 and the 15th of August 1834) was under the deed of 1810. But still the question remains, was the estate, in respect of which he was in possession, an estate deriving its efficacy from the base fee created by the conveyance of a tenant in tail, or from an absolute estate in fee simple, which upon the death of Thomas Davies (the younger) descended to Netterville Davies, as his brother and heir? In the latter case the estate would not have been barred by the recovery, if valid, but would depend upon and be created by the recovery; in the former case, the estate would be barred by the recovery, supposing it to have been valid.

This leads to the consideration of the 9th section of 4 & 5 W. 4, c. 92. It enacts that, "this Act shall not render valid any fine or "common recovery, as to lands of which any person shall at the "time of the passing of this Act be in possession, in respect of "any estate which the fine or common recovery, if valid, would "have barred." Now, what is the meaning of this? Does it mean a possession really, actually, and in point of law and right, warranted by an estate and legitimate title? or does it mean a possession, which the party in possession himself says, or thinks (though erroneously and improperly), is derived out of, or validated by, a supposed estate, which in point of law has no existence at all? I apprehend it must mean the former. Suppose Netterville Davies had, in 1810, sold the estate in fee, subject to his father's life estate, and the pur-

(a) 10 Rep. 97, b.

(b) 2 Ld. Ray. 779.

(c) 1 Rep. 62, b.

(d) 2 Rep. 52, a.

chaser had taken possession in 1816, claiming the fee under his conveyance, in which it was recited that his vendor had the fee, could it be said, that in an ejectment by Geoffrey Davies, the issue in tail, the inquiry was to be—not what estate Netterville Davies had, in point of law and in truth, at the time of the conveyance, but what the purchaser said he had, or choose to refer his possession to? This, I apprehend, could not be contended for. How can it vary the case, that Netterville Davies himself is in possession, instead of his grantee? Even then, taking for granted that as against Netterville Davies, and all deriving under him, he had considered himself and called himself heir-at-law of his brother, and as such entitled to an estate in fee-simple, founded on the recovery, the question is, whether this is sufficient to establish that proposition against the present claimant?

H. T. 1853.

*Exch. Cham.*

DAVIES

v.

D'ARCY.

Now, if it be, it must be on some principle of estoppel, which precludes the claimant from averring the truth of the case. But how can such a principle exist against the issue in tail? The cases to which I have already referred, establishing that the issue may be remitted, notwithstanding the acts or declarations of his ancestor, show that no such estoppel binds the issue. Estoppels bind only parties and privies: *Edwards v. Rogers* (a). Estoppels, in fact and by record, by fine and recovery, shall bind, not only the party to the estoppel, but also all privies who claim under them; but if the heir do not claim as privy, but by his own purchaser, or from another ancestor, he shall not be bound. This distinction is recognised in *Goodtitle v. Morse* (b). We must start with the assumption that the recovery is void—that is, that there is no valid recovery, otherwise the Act does not apply at all. Then the Act is resorted to to give it retrospective validity. But the Act says it shall not be retrospectively validated where the party was, at the passing of the Act, in possession in respect of an estate which the recovery, if valid (that is, if originally valid), would have barred (that is, would, when suffered, have barred). Now, when the recovery was suffered, it would, if valid, have barred the estate in remainder of Thomas Davies (the younger), and the ulterior remainder in tail of Netter-

(a) Sir W. Jones, 456.

(b) 3 T. R. 371.

H. T. 1853. ville Davies. That ulterior remainder in tail was, in truth and fact,  
*Esch. Cham.* the sole legal foundation for the deed of 1810, and the deed of 1810  
DAVIES was the foundation of the possession; consequently the case falls  
v. within the express terms of the exception engrafted by the 9th sec-  
D'ARCY. tion, upon the general remedial provisions of the 5th and 8th. I  
cannot see how the lessor of the plaintiff, when he has actually en-  
tered, can have a right to say, "I am remitted to my old estate tail,  
although my father was not;" and that in an ejectment (which is  
only a mode of entry), he is precluded from saying that the estate  
was in his father as tenant in tail, for that is the meaning of re-  
mitter. Then, if he cannot be precluded from so saying, the case, as  
between him and those deriving from his father, must be decided on  
the principle that the estate tail was in his father; and that estate  
would have been barred. Even if it could be considered that Tho-  
mas Davies (the younger) was assignee of his father's life estate, and  
that upon his death that estate vested in Netterville Davies as spe-  
cial occupant; yet Netterville Davies had only that estate and his  
own remainder in tail, when he executed the settlement of 1810, and  
still, upon his father's death, the estate derived under the settlement  
would have been fed out of the remainder in tail, then become an  
estate in possession. This case, therefore, comes within the express  
terms of the section; and I therefore am of opinion, for these rea-  
sons, that the judgment of the Court below should be reversed.

MOORE, J.

This case will depend on the construction to be given to one of  
the clauses in the 9th section of the Fines and Recovery Act. That  
Act makes valid recoveries already suffered, notwithstanding certain  
imperfections which vitiated them at Common Law. The 9th section  
of the Act created certain exceptions to the operation of the Act;  
and, among others, it contains this one:—Where any person was,  
at the passing of the Act, in possession of the lands in respect of  
any estate which the recovery, if valid, would have barred. In  
order to decide whether the present case comes within that clause,  
it will be necessary to ascertain three several matters:—First, who  
was in possession of the lands sought to be recovered in 1834, at

the time of the passing of the Act? Secondly, what was the estate to which the possession was to be referred? Thirdly, was the estate, under which possession was so had, one within the words and meaning of the clause I have read?

H. T. 1853.  
*Exch. Cham.*  
**DAVIES**  
*v.*  
**D'ARCY.**

As to the possession—it is found that Netterville Davies was the person in possession when the Act was passed.

Next, what was the estate of Netterville Davies at that time under which he held possession? This is a question of law.—[His Lordship stated the facts.]

The question then arises, what was the legal effect of the deed of 1810, executed by Netterville Davies, as remainderman in tail?

I think that by that deed a base fee was conveyed to the trustees to the use of Netterville Davies for life, with remainder over; and that, from the year 1810 down to the year 1834, when the Fines and Recovery Act passed, and from thence to his death in 1848, Netterville Davies had, in point of law, no other estate in the lands than an estate for life derived under the deed of 1810, and that he was estopped, by his execution of that deed, from claiming any other estate. I think this is clearly established by the case of *Doe d. Rivers (a)*. In that case Mary Fifield was tenant in tail. She married a Mr. Neville; but previous to her marriage, she, by deeds of lease and release, conveyed the lands to trustees in fee, to the use of her intended husband for life, remainder to herself for life, remainder to the first and every other son in tail of the marriage. She subsequently died, leaving her husband and her son surviving. The son brought his ejectment against the husband, who claimed an estate for life, either under the settlement, or as tenant by the courtesy. It was held that the settlement created a base fee, voidable by the issue in tail by entry, and therefore that the husband had no title, under the settlement, against the issue in tail after he had entered. It was also held that he had no title as tenant to the courtesy; for though his wife was, before the marriage, tenant in tail, yet by the settlement, she made herself and her husband tenants for life, and, consequently, never was seised of an estate tail in possession at any moment during the coverture.

(a) 7 T. Rep. 276.

H. T. 1853. The same point is decided in the case of *Goodright v. Meade*  
*Esch. Cham.] and Shilson (b)*, where it is laid down by the Court in these  
 DAVIES terms:—"It was formerly doubted whether a tenant in tail could,  
 v. "otherwise than by a feoffment, grant any thing more than for his  
 D'ARCY. "life; but it is now settled that he may, by lease and release, pass  
 "a base fee, and it is in his power to limit the remainder as he  
 "pleases; and it makes no difference whether it is limited to the  
 "re-lessee, or to a stranger, or to himself for life, with remainders  
 "over; for the base fee feeds all the uses that are limited upon it,  
 "until avoided by the entry of the issue in tail." There are several  
 other authorities to the same effect; and I have arrived at a clear  
 conclusion, that the estate which Netterville Davies had in 1834  
 was not an estate tail, but an estate for life—part of the base fee  
 created by the deed of 1810.

I come now to the consideration of the 9th section of the Fines and Recovery Act, and to the question whether the possession and estate of Netterville Davies in 1834 are such as brought this case within any of the clauses of that 9th section? I think that one of the important objects of the Act was, to validate titles derived under recoveries suffered by parties having competent estates, but which recoveries were bad, on what may be called technical and formal grounds. It is many years since that recoveries were considered to be mere modes of conveyance; and it is to me matter of astonishment that such a length of time was allowed to pass, during which the intention of parties was defeated, and titles invalidated by technical objections to the recovery.

The objections to the recovery in the present case are those specified in the 5th, 7th and 8th sections of the Act; and it is admitted that, by the operation of those three sections, the recovery here is made good, and the title of the defendant, the mortgagee, established, unless it is shown that the case falls within some one or other of the exceptions enacted by the 9th section.

The enactment in the 5th, 7th and 8th sections is general, and validates all recoveries, retrospectively as well as prospectively, notwithstanding the specified objections. If the Act had stopped with

these sections, injustice would have been done in several cases, and the object of the 9th section was to prevent that injustice, by excepting from the general enactment in the preceding sections certain specified cases. I shall only refer to two of the exceptions in the 9th section; and it appears to me that each of them throws light on the other. The first I shall advert to is this:—"And when any person "who would have been barred by any fine or common recovery, if "valid, shall, before the passing of this Act, have had any dealings "with the lands comprised in such fine or recovery, on the faith "of the same being invalid, such fine or recovery shall not be "rendered valid by this Act." This was an exception which justice clearly required—the recovery being bad, dealings with the lands on the faith of its invalidity would have been perfectly good in point of law; and it would have been manifestly unjust, by an *ex post facto* law, to have invalidated or injuriously affected a dealing, good and legal when made. The Legislature, therefore, excepted from the operation of the Act dealings entered into on the faith of the invalidity of the recovery. The Act is silent as to the case of dealings had on the faith of the recovery being valid, and for this reason, because it was the object of the Legislature to validate titles really bad, but intended and supposed to be good by parties competent to make them good. If this be not the construction of the Act, it would be altogether inoperative; for as dealings, had on the faith of the invalidity of the recovery, are protected by express words, the Act can only apply to and have operation in cases where the dealing was had on the faith of its validity.

I think the present case is one to which the statute ought to be considered as peculiarly applicable, for all the dealings had were on the faith of the validity of the recovery. Thomas Davies (the elder) and Thomas Davies (the younger) had power to suffer a valid recovery. They thought they had done so, and they executed the deeds of 1806 on that supposition. D'Arcy the defendant took his mortgage on the faith of the validity of the recovery. Netterville Davies, in his life, and his trustees, in the deed of 1810, all acted under the same impression: and it is to be

H. T. 1853.  
*Esch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.



H. T. 1853. *Exch. Cham.* recollected, that Netterville Davies, who was tenant in tail, and against whom the recovery of 1806 was bad, though he thought it to be good, had at all times, from his father's death in 1816, to his own death in 1848, full power to have suffered a valid recovery, and thereby to have validated the deed of 1810.

DAVIES  
v.  
D'ARCY.

I now come to the clause in section 9, which is the one most applicable to this case, and on the true construction of which this case must depend. It is this:—"And this Act shall not render valid "any fine or recovery, as to lands of which any person shall, at the "time of the passing of this Act, be in possession, in respect of any "estate which the fine or recovery would have barred."

I have satisfied myself on the grounds already stated, that in 1834, when the Act passed, the estate of Netterville Davies was not an estate tail, but an estate for life, part of, and derived from, the base fee created by the deed of 1810; and if I be right in this, the question will be, whether it be such an estate as falls within the words and spirit of the clause I have mentioned? In my opinion, it neither comes within the words or meaning of that clause. It appears to me that the true construction of the clause is this. To explain my view, I will take the case of Netterville Davies. On the death of his father in 1816, he was entitled, under the settlement of 1769, to an estate tail in possession. The recoveries and said deeds of 1806 were clearly invalid against him. It was not necessary for him to take any steps to impeach them; nor had he any means or opportunity of doing so. And if he had not executed the deed of 1810, he would unquestionably have been in the year 1834, when the Act passed, tenant in tail in possession, and thus would have been in possession in respect of an estate that would have been barred by the recovery. In such a state of things, it would have been most unjust for the Legislature, by the retrospective operation of the Act, to have validated the recovery, and thereby subject the estate tail to charges which, up to the passing of the Act, were null and void against it; and I think such a case would clearly be within the words and spirit of this exception.

I think there are other cases which would fall within this clause, and which justice required to be protected. Suppose Netterville

Davies, so being tenant in tail, had conveyed the lands for his own life, the grantee would be in possession in "respect" of the estate tail—an estate that would have been barred by the recovery, if valid. This case, I think, would also come within the very words of the statute; and justice required that such a case should be excepted from the operation of the Act. I think that the same observation would be applicable to the case of a lessee for life or for years, created by a tenant in tail, and perhaps also to such a lease as a tenant in tail is warranted in making, and also to an elegit creditor of the tenant in tail; because, in all the cases I have put, the possession would have been "in respect" of the estate tail, an estate that would have been barred by the recovery if valid.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

But it has been argued on the part of the plaintiff that even where a base fee is created by a tenant in tail, the case would come within the words "in respect of," because the base fee was created by, and was derived from, the tenant in tail. I think one of the answers to this is that in contemplation of law the base fee so created is no part of the estate tail, but is one adverse to and inconsistent with that estate. A base fee so created is not void, but only voidable by the issue in tail, and remains good, with all the attributes of a fee, until avoided by entry.

Suppose that, by the deed of 1806, the lands had been conveyed in fee to a purchaser, instead of being limited to Thomas Davies (the younger), the vendors selling, and the purchasers buying, under the faith and supposition of the recovery being valid. The recovery being bad, the purchaser would only have taken a base fee, already voidable at Common Law, by the issue tail of the vendor. Suppose that purchaser to have got possession, and to have been in possession in 1834, would the Court say that his possession then was in respect of an estate that would have been barred by the recovery, if valid? I think not; because the estate of the purchaser was one adverse to the estate tail; and also because it was an estate that, instead of being barred by the recovery, would, on the contrary, have been made good and valid by it.

Now, the deed of 1810, being a marriage settlement, is equally

H. T. 1853. a deed for valuable consideration. The base fee created by it is in  
*Exch. Cham.* the same way adverse to the estate tail, and would have been confirmed, and not barred by the recovery, if valid; and I therefore  
DAVIES think that the estate created by the deed of 1810 does not come  
v. within the words of the clause.  
D'ARCY.

But there is a further, and, to my mind, a decisive, objection to the construction sought to be given to the clause by the plaintiff; it is this, that it would make the exception co-extensive with the enacting clauses, and thus render the Act totally inoperative. Possession must always be referrible to some estate. The only legal estate subsisting in 1810 in *Netterville Davies* was an estate tail, and possession must, in one sense of the word, be "in respect" of it. According to my construction, if the possession be in the tenant in tail, or his assignee or lessee for life, that possession is clearly within the words "in respect" of the estate tail, because it was a possession under that estate, or a part of it—the estate tail remaining untouched and uninjured. But according to the plaintiff's more extended construction, which clearly includes the one I have given it, a base fee created by the tenant in tail is within the words; because it was created by the tenant in tail; and this construction of the plaintiff must extend to every case where a base fee was created, whether by an innocent conveyance, as was the settlement of 1810, or by feoffment or disseisin; and it appears to me that by the plaintiff's construction, every case of possession will be within the exception, and the enacting clauses will be thereby neutralised, and in fact repealed.

It is a well established rule of law, that in a grant, if the exception be as large as the grant, the exception will be void, because it would be absurd to construe a grant as giving with one hand, and taking back with the other. The same principle is applicable to the construction of Acts of Parliament. It is a rule in construing an Act of Parliament, that if following literally the words used, it would lead to an absurdity, the Court would so modify and control these words as would prevent that absurdity. And therefore I would say, that if this case was considered to fall within the literal words used (which, in my opinion, it does not), the Court would

control the words, so as to avoid the absurdity of giving such an effect to an exception as nullified the enacting clauses of the Act, and rendered it a dead letter.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

On the whole, my opinion is, that this case does not come within any of the clauses in the 9th section, and that it does come within the operation of the enacting clauses; and that by their operation the settlement of 1810 is a valid settlement, which only can be by the recovery of 1806 being made good by the statute. And if that recovery be made good, the mortgage under which defendant claims, and which was made on the faith of its validity, must also be made good. And those claiming under the deed of 1810 have no ground of complaint, as the purchasers under it, clearly, were intended to take subject to that mortgage.

For these reasons, I think, the judgment of the Court of Queen's Bench was right, and ought to be affirmed.

BALL, J.

The question for our determination is, whether Netterville Davies was, in the month of August 1834 (when 4 & 5 W. 4, c. 92, was passed), in possession of the lands in this ejectment, in respect of an estate which the recovery of 1806, if valid, would have barred? If he were not so, the defects of that recovery were cured by the 5th, 7th and 8th sections of the Act, and the plaintiff was not entitled to recover in the ejectment. If he were so, the defects in the recovery were not cured, and the plaintiff was entitled to a verdict. By the interpretation clause of the Act, the term "estate" is made to comprise both legal and equitable interests, and the legislation therefore applies to both.

To determine whether Netterville Davies was in possession of an estate which the recovery, if valid, would have barred, the first inquiry obviously is, what was the nature of the estate in respect of which he was in possession? and that being ascertained, the second inquiry will be, was it an estate which the recovery, if valid, would have barred?

In order to determine the nature of the estate in respect of which Netterville Davies was in possession in 1834, it will be

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

expedient to go back to the recovery of 1806, and see what was the estate, as well of Netterville Davies as of the other parties concerned, immediately before the suffering of the recovery; and what was the effect of the recovery in relation to their several rights. In the consideration of this subject, it will be material to keep distinct the effect of the recovery upon the estates of the parties, in the event which occurred of its being void, from what it would have been had the recovery been valid.—[His Lordship recapitulated the facts.]—Under the foregoing circumstances, the rights of the several parties, which I have thus described as they existed immediately before the suffering of the recovery, stood thus:—after the suffering of the recovery and the execution of the recovery deed, the life interest of Thomas Davies (the elder), which was only a trust estate at the time of the suffering of the recovery, was surrendered to Thomas Davies (the younger) by the recovery deed, and the former ceased thenceforth to have any estate (either legal or equitable) in the lands. This recovery being void, the remainder in tail of Thomas Davies (the younger) was not barred thereby, and his mortgage to D'Arcy operated as the conveyance of a base fee to the latter, determinable upon the death of Thomas Davies (the younger) without issue, which afterwards occurred—the equity of redemption upon the mortgage of that base fee remaining in Thomas Davies (the younger). As to Netterville Davies, the recovery having been void, and he having been no party to the transactions of 1806, his remainder in tail, expectant upon the decease of his brother Thomas Davies (the younger) without issue, was not barred, or in any manner affected thereby.

So matters rested until 1809, when Thomas Davies (the younger) died without issue, whereupon Netterville Davies became the next remainderman in tail under the settlement of 1769, subject to the life estate of his father Thomas Davies (the elder) which was then outstanding in law in Roderick O'Connor, and which so continued until the death of Thomas Davies (the elder), in 1816. Netterville Davies, having thus in 1809 become the next remainderman in tail, continued so to the time of his marriage in 1810, when he executed the settlement of that date; whereby he conveyed

the lands to trustees and their heirs, to the use of himself for life, with remainder to the first and other sons of the marriage in tail male. The effect of this conveyance of the remainder in tail was to create a base fee in the trustees, with a reservation thereout of a life estate to Netterville Davies, which continued in him to the time of the passing of the Act for the Abolition of Recoveries, in the month of August 1834. Thomas Davies (the elder) having died in 1816, and his estate for life under the settlement of 1769, which had been outstanding in Roderick O'Connor, having thereupon ceased, Netterville Davies, the next remainderman under that settlement, entered upon the lands, and continued in possession thereof thenceforward down to the passing of the Act above mentioned. Such having been the estate of Netterville Davies in the lands at the time of the passing of the Act, and such having been his possession at the same period, it follows that, as the law referred his possession to the title then rightfully in him, he was at that time in possession in respect of his life estate reserved to him by the settlement of 1810, and carved out of his remainder in tail under the settlement of 1769; for that the life estate so reserved to him was derived out of, and was not adverse to, his estate tail under the settlement of 1769, is established by the authorities referred to by my Brother GREENE, and seems to admit of no question.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
*v.*  
 D'ARCY.

It was argued, however, that the inquiry in respect of what estate Netterville Davies was in possession at the time of the passing of the Act, was to be determined, not by reference to the estate, which is ascertained to have been in point of law then vested in him, but to such estate as from the recitals contained in the settlement of 1810, it must be inferred that he supposed or believed to be his at the time; but I cannot understand the Legislature to have meant that the declarations of a party in possession of an estate as to its nature or character, in ignorance it may be of his true title, should constitute the test whereby to determine in respect of what estate he was so in possession.

Hitherto I have discussed the question as to the nature of the estate in respect of which Netterville Davies was in possession at

H. T. 1858.  
*Exch. Cham.*

DAVIES  
v.

D'ARCY.

the time of the passing of the Act, in the event which occurred of the recovery being void; and the next inquiry will be, whether the estate of which he was so in possession would have been barred by the recovery had it been valid? But before proceeding to this question, I wish to consider what would have been the estate of Netterville Davies in the event (which did not occur) of the recovery being valid? And I do this for the purpose of keeping quite distinct from each other, in the subsequent consideration of the case, the two matters—viz., the estate which Netterville Davies had, in the event which did occur, of the recovery being void; and the estate which he had not, but would have had, in the event which did not occur, of the recovery being valid. In point of fact it appeared to me, in the course of the argument at the Bar, that these two subjects were occasionally confounded together—the estate which he would have had in the *supposed* case, being every now and then assumed in argument to have been the estate which he had in the case which actually occurred.

Had the recovery been valid, the estate tail of Thomas Davies (the younger) would have been thereby barred, and the mortgage to D'Arcy would have been a conveyance to him of the fee-simple absolute in the lands; the equity of redemption remaining in Thomas Davies (the younger), the remainder in tail of Netterville Davies would have been also barred; and he would have ceased, consequently, to have any estate in the lands upon the recovery being suffered. So matters would have stood at the time of the death of Thomas Davies (the younger) in 1809, when, by reason of his decease without issue, his equity of redemption would have descended on Netterville Davies as his heir-at-law; and that equity of redemption would have been the estate in the lands which Netterville Davies would have conveyed to the trustees by settlement of 1810, reserving thereout a life estate to himself, with a remainder in tail to the first and other sons of the marriage. Thus, had the recovery been valid, the life estate so reserved to Netterville Davies would have been an estate carved out of the equity of redemption in fee; and accordingly the estate in respect of which he would have entered on the lands in 1816, and continued in possession to the

time of the passing of the Act, would have been *that* life estate: whereas the recovery having been void, the estate in respect of which he actually, and not hypothetically, was in possession at that time, was his estate for life derived out of his remainder in tail under the settlement of 1769.

H. T. 1853.  
*Esch. Cham.*  
 DAVIES  
*v.*  
 D'ARCY.

The question then is, was this an estate which the recovery, if valid, would have barred? The remainder in tail itself would have been confessedly barred by the recovery, if valid; and this being so, it should seem superfluous to argue the point, that an estate carved out of the remainder in tail, after the recovery had been suffered, would have been barred likewise. However, as the contrary has been pressed in argument, it may be right to cite the authorities, which seem to leave no doubt upon the matter.

In *Cholmondely's case* (a), the point is thus put:—A, tenant in tail; remainder to B in tail. B grants his estate in the lifetime of A to C for life, remainder over. After this A suffers a recovery; and it was held that the effect of that recovery was to bar not only B's remainder in tail, but also the estate for life of C, and the remainders over; so also *Capel's case* (b) is to the same effect:—A, tenant in tail, remainder to B in tail. B grants a rentcharge in fee, and afterwards A suffers a recovery, and it was held that the recovery had barred not only B's remainder in tail, but the rentcharge which he had granted in fee; and it was resolved that no charge, interest or estate made or created by him in remainder in tail, shall be good against the recoveror in a recovery suffered by the first tenant in tail; inasmuch as upon the recovery being suffered, the recoveror is in under the estate of the first tenant in tail, which estate was never subject to any charge, interest or estate created by the remainderman in tail. Such would have been the effect of a valid recovery suffered in 1806, if the estate for life of Netterville Davies had been carved out of his remainder in tail before the recovery had been suffered; but that operation having taken place in the year 1810, long after the suffering of the recovery, and when the remainder had long ceased to have existence, it seems difficult to understand how it would be possible that the life estate of Net-

(a) 2 Coke, 50.

(b) 1 Coke, 62.



H. T. 1853. *terville Davies* should not have been barred by a valid recovery  
*Esch. Cham.* under such circumstances.  
 DAVIES  
 v.  
 D'ARCY.

The view which I have thus presented was encountered, if I rightly understood the argument, in this way:—the settlement of 1810 recited in substance that the recovery of 1806 was valid; and accordingly the estate thereby conveyed to the trustees must be deemed to have been such estate as *Netterville Davies* would have had in the event of the recovery being valid—viz., the equity of redemption in fee, and not the remainder in tail, which, upon that recital, would have had no existence at the time of the settlement. With respect to this objection, it might, perhaps, be sufficient to observe, that the settlement of 1810 purported to convey in terms “all the estate and interest of *Netterville Davies* in the lands;” and the recital above referred to, being founded on a clear mistake of his true title, the estate which he actually had, and not that which he mis-recited to have been his, passed by the settlement: the authorities upon this point are collected in 4 *Cruise Dig.*, p. 264.

It was further contended, that instead of barring the estate in respect of which *Netterville Davies* was in possession at the time of the passing of the Act, the recovery, if valid, would have established the settlement of 1810, and all the estates thereby created, including the life estate of *Netterville Davies*, in respect of which he was in possession, and consequently the case was not within the exception contained in the 9th section of the Act. To this, the answer appears to be, that the recovery, if valid, would not have established the settlement of 1810, considered as it was, in point of law, a settlement of the remainder in tail; but on the contrary, would have avoided it for the reasons above suggested; the case would be otherwise if it had been a settlement of the equity of redemption in fee, which it was not, as before pointed out. The objection appears to rest upon the fallacy of assuming that the estate settled by the deed of 1810 was that which *it would have been*, had the recovery been valid, viz., the equity of redemption in fee; and not that which it actually was by reason of the invalidity of the recovery, viz., the remainder in tail. Had it been the former, it would have owed its existence to the recovery, and consequently would have been validated and

sustained, instead of being barred thereby; but the subject matter of the settlement having been the remainder in tail, it would have been barred by the recovery, as already shown.

Furthermore, it was argued that Netterville Davies having, by the settlement of 1810, recited that the recovery of 1806 was valid, and having settled the estate upon the assumption of its validity, was estopped from afterwards insisting that the recovery was void, which, it is insisted, would have had the effect of defeating the settlement; that accordingly, as against him, the recovery must be deemed to have been valid, and consequently the estate for life, in respect of which he was in possession at the time of the passing of the Act, must be deemed to have been an estate which the recovery would not have barred, but on the contrary would have validated. This objection is based upon the assumption, that the effect of Netterville Davies being permitted to rely on the invalidity of the recovery would be, that he would be enabled thereby to defeat the settlement of 1810; but as I have already shown, such would not be the case, as in the event of the recovery being void, the settlement of 1810 would take effect out of the remainder in tail in Netterville Davies.

With respect to D'Arcy's mortgage, the effect of Netterville Davies being at liberty to rely on the invalidity of the recovery would, of course, have been to enable him to defeat it; but how could D'Arcy, as the assignee of this mortgage, who is the defendant here, establish an estoppel against Netterville Davies, in respect of the recitals of the deed of 1810, to which they were strangers? Again, the estoppel of Netterville Davies (the ancestor), supposing it to exist, is relied on here against his issue in tail (the plaintiff), who, as such, is not bound by it; but above all, it is relied on against the plaintiff claiming as issue in tail, under the settlement of 1769, by a title paramount to all the acts of his ancestor Netterville Davies, and all his dealings with the estate. But furthermore, the objection assumes, that an estate by estoppel is within the meaning of the words of the statute, "in possession in respect of an estate which the recovery, if valid, would have barred." This position may admit of a question.

H. T. 1853.  
*Exch. Cham.*  
DAVIES  
v.  
D'ARCY.

H. T. 1853.  
*Exch. Cham.*

DAVIES

v.

D'ARCY.

For these reasons, I am of opinion that the judgment of the Court below ought to be reversed.

PERRIN, J.

It is unnecessary, after the full and clear statements and detail of facts by my Brethren who preceded me, to repeat them. The question is, in respect of what estate had Netterville Davies possession of the lands in dispute in August 1834? I begin with the undisputed fact that the recovery suffered by his father and brother was invalid, and did, therefore, not bar his remainder in tail—as, if it had been perfect, it would have done. His brother Thomas died in 1809—his father surviving; he died in 1816; therefore Netterville's remainder did not vest in possession until 1816, when the special verdict finds that he was in possession, and so continued from his father's death until his own death in 1848. But in 1810, he, being then tenant in tail in remainder expectant on his father's estate for life, and not in possession, executed a settlement in contemplation of marriage, whereby he by lease and release granted the lands to trustees for the use of himself for life, remainder, subject to a jointure to his wife, to his first son in tail; and, on the death of his father, he entered, as was lawful for him to do, being then entitled as tenant in tail in possession under the settlement of 1769, or as tenant for life under his own settlement of 1810, and he so continued in possession and receipt of the rents and profits of the said lands and premises until and on the 14th of August 1834, and on until his death in 1848. It is not found or suggested that D'Arcy, the mortgagee, interfered with or disturbed him in that possession and receipt, nor is it found that he ever paid interest on the mortgage; Netterville Davies, therefore, was in possession of the lands in 1834.

In respect of what estate had he that possession? Plainly under his own settlement of 1810, or his father's of 1769. My own impression was that this might be a question of fact, or a mixed question of law and fact—if so, the verdict is imperfect in not finding upon it; but I am willing to take it as it has been put and considered by my Brethren who have preceded me, as a question of law upon the result of the conveyances found. He

was in 1810 tenant in tail in remainder expectant, but absolute and indefeasible. He then made a conveyance to trustees to the use of himself for life, with remainder over to his son, which was either valid or invalid: surely for his own life it was valid. In 1816 the tenant for life died, and Netterville Davies became entitled to enter either as tenant in tail, or tenant for life (I concede as tenant for life under his own settlement); he enters, he continues in possession; in respect of what estate? What other but that so limited to him by the deed of 1810; and under that, and in respect of that, he was in possession in 1834—in perfect legal possession, under a conveyance by himself, tenant in tail for the term of his life, which was perfectly competent for him, as tenant in tail, to grant, whatever may be said of the further provisions in the deed.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
*v.*  
 D'ARCY.

The recovery, if valid, would have barred that estate for life, and the whole settlement of 1810, under whatever designation it is placed, base fee or otherwise. If valid, it would have bound the remainder in tail to Netterville Davies, by preventing its existence thenceforward, and it would absolutely extinguish it. In 1806, on its perfection, he would have had no estate or interest in the land; the fee would have been in his brother, whose mortgage to D'Arcy would have been valid and indefeasible; and he could make no settlement as tenant in tail expectant, or in remainder, either during or after his father's life, for he was no longer tenant in tail: that estate was barred—it was destroyed—he had it not. This appears to me to be an answer to the supposed difficulty—viz., that the base fee is adverse to the estate tail, and therefore would not be barred as the estate itself would; for the clause in the statute applies thus—the estate in 1834 would have been *barred* by the recovery of 1806, if valid; for the estate tail in Netterville Davies would have been barred, and he could create no estate—he would be barred, and any power or ability of creating or conveying (which he had not) any estate would have been barred by the recovery. The words of the statute seem to me plain and absolute, and to embrace this case, if any. I do not think we are at liberty to depart from, extend or narrow them according to any supposed

H. T. 1853. justice of the case, or rather nullify them; and, therefore, with the  
*Exch. Cham.* utmost respect for the very able and learned judgment and powerful  
argument of my Brother MOORE, I feel bound to the view expressed  
by my Brothers GREENE and BALL.  
DAVIES  
v.  
D'ARCY.

There is another matter which was not mentioned in the argument, but was mooted or mentioned in our chamber—viz., that there has been a possession of thirty years at least, establishing a title in Netterville Davies, against which D'Arcy can have no pretext. The adverse possession is not merely a bar and defence to an ejectment; but if a party be put out of possession, and be put to his ejectment, it gives him a title.

I, therefore, am of opinion that judgment should be reversed.

CRAMPTON, J.

In this case the question is, was Netterville Davies, at the time of the passing of the Fine and Recovery Act, in possession in respect of any estate, which the recovery of 1806, if valid, would have barred? It is contended that the recovery of 1806 was invalid, and can now only be sustained by the retrospective operation of the statute; but undoubtedly its defects are cured, unless the plaintiff can show his case to be an excepted case, protected by one of the savings of the 9th section of the Act.

These considerations grow out of this:—first, was Netterville Davies in possession of the premises at the time of the passing of the Act, in 1834, and secondly, what was the effect of the statute upon that estate? It is conceded that Netterville Davies got the possession in 1816, upon the death of his father, who was tenant for life under the settlement of 1769, and that he remained in possession until 1848. Undoubtedly a case of title might grow out of this length of possession; but that question was not raised in the Court below, or at the trial, and if it had been raised, evidence might perhaps have been given of payment of interest; I therefore do not rest my judgment upon that ground.

The second question is an important one, but I own I see no difficulty in it;—it is, what estate had Netterville Davies in 1834? It is not what he was seised of in his own opinion. His right does

not depend on his own opinion. There may be cases of estoppel to which that would apply, but here that doctrine is quite out of the case; it is impossible, therefore, to decide this case upon a party's own notion of what estate he had. I take it to be manifest that what estate he had in 1834 is a question of law, to be collected from the facts in the special verdict. The facts seem to me clearly to lead to the conclusion that his estate was an estate derived from the settlement of 1769. Take the dates:—the first is 1769, on which occasion the settlement was executed, limiting the estates to Thomas Davies (the elder) for life, remainder to Thomas Davies (the younger) in tail male, remainder to Netterville Davies in tail male. That was the state of things in 1806. This last date is important, because the defence is founded on the transactions of that year. The defendant claims as mortgagee; his estate was created by the deed of 1806, based on the recovery of the same year it was created, by the conveyance of a tenant in tail, not supported by a valid recovery, and therefore vesting only a base fee in the mortgagee. D'Arcy, the mortgagee, then had a base fee terminable with the estate tail out of which it was created. In 1809 Thomas Davies (the younger) died *without issue*, and there was then an end of his estate tail, and of this base fee carved out of it; both expired at the same moment. But Netterville Davies took no estate under Thomas; on his brother's death, the title of Netterville accrued as tenant in tail in remainder. Then, unless the deed of 1810 totally changed the character of the estate of Netterville Davies, his title in 1834 was under the deed of 1769. By the deed of 1810, which was what is called an innocent conveyance, Netterville Davies converted his estate tail into a base fee, and limited the estate to himself for life, with remainders in tail. The estate tail was not thereby annihilated or discontinued by this conveyance; but this well known result took place, which I have before stated, the tenancy in tail was converted into a base fee: it was and is still subsisting for the benefit of the issue in tail. The tenant in tail who creates a base fee cannot undo his own act; he is estopped; but the issue in tail is not affected by it; he has a right to enter, and the effect of such entry is to avoid

H. T. 1853.  
*Exch. Cham.*

DAVIES  
v.  
D'ARCY.

H. T. 1853.  
*Each. Cham.*  
DAVIES  
v.  
D'ARCY.

every instrument trenching on his estate tail. The base fee is but a defeasible estate, and is defeated the moment the issue in tail enters upon the land. Netterville Davies, after the execution of this instrument, was seised of a tenancy for life, part of the base fee which was itself equivalent to, and coeval with, the estate tail so converted: it is only an estate tail in another form. Netterville Davies entered in 1816: he entered under no other title than what the law cast upon him, namely, his remainder in tail under the settlement of 1769. He was tenant in tail in right of that settlement. It was argued that he entered as heir-at-law to his brother Thomas, but that could not be so; the estate of Thomas expired on his death, and whether he reduced his estate tail to a base fee, or whether it continued in him in point of law, makes no difference.

That leads me to the terms of the 9th section. The principle of law ruling this case is, where a tenant in tail suffers a valid recovery, that recovery bars all remainders over, and all estates carved out of those remainders. The recovery of 1806, if valid, would therefore have barred the remainder of Netterville Davies, and consequently the base fee and all the estates carved out of it. The reduction of the estate tail (or the base fee equivalent to it) into an estate for life, with remainders over, could not change the effect of a valid recovery. Suppose Netterville Davies had in 1810 made a conveyance by lease and release to the use of himself in fee, would that estate be barred by the recovery of 1806, if valid? It cannot be said that this estate would not be barred. Suppose he had made a conveyance to a purchaser by lease and release, the estate would also be barred. I cannot see any distinction between barring the whole estate tail, and a portion carved out of it. It is admitted that a lease for life, or any incumbrance created by a remainderman, would also be barred by a valid recovery; and yet it is contended that the deed of 1810 so altered the estate of Netterville Davies that he is now to be held, in 1834, to have been in possession of an estate that would not be barred by the recovery of 1806, if valid.

The statute is very accurately framed; the 7th and 8th sections

are protective of the possession of those deriving under a recovery; the 9th section is also protective of the possession, but it is of a possession adverse to the recovery, not a possession under the estate that the recovery would have barred. The words are not "in possession of any estate," but "in possession *in respect of* any estate;" showing the intention of the Legislature to protect, not merely the possessors of estates which were existing at the time of the recovery suffered, but the possessors of all such estates as were carved out of or derived from the estates which the recovery, if valid, would unquestionably have barred. Therefore, the Legislature seems to have adopted the words "possession in respect of an estate that would have barred," &c., instead of using the words "possession of any estate that would *have been* barred. It has been argued that the Legislature in this 9th section, protecting persons who dealt on the faith of a recovery being invalid, must be also understood to intend to protect persons who dealt on the faith of the recovery being *valid*. But this is not so; the previous sections were intended to protect those deriving under recoveries, so far as the Legislature thought them entitled to protection; whereas the 9th section is merely exceptive of the provisions of the previous sections, and applies only to the cases of persons whose possession is adverse to the recovery.

Suppose that in 1833 Netterville Davies had died, and that the plaintiff had then entered, it is plain his title would be under the settlement of 1769. Can it then be said that because his father lived until the passing of the Act, he is now to be barred from bringing an ejectment? Suppose Netterville Davies, before the recovery of 1806, had married, and executed the deed of 1810, *mutatis mutandis*, the effect would have been exactly the same. If he had executed the deed in 1805 instead of 1810, he would have reduced his estate to a base fee; but it cannot be said that that estate would not have been barred by the recovery of 1806, if valid. I see nothing to distinguish between the two cases. The true test, therefore, with respect to the clause of the 9th section under consideration is this:—was the estate of the person in possession either an estate that would have been barred by the recovery,

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.



H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

if valid, or any estate carved out of or derived under that estate? Now, applying this test, it appears clear that Netterville Davies was in possession in *respect* of an estate that would have been barred, and if that be so, it is plain the case of the plaintiff comes within this protective clause of the statute; and the case of the plaintiff is *a fortiori* a stronger case than that of Netterville Davies, because he is not bound by an instrument executed in prejudice of his rights. Netterville Davies thought proper to execute this conveyance by lease and release; and unless we give it an operation contrary to the rules of law, it is impossible to defeat this ejectment.

I, therefore, am of opinion, that the judgment of the Court below ought to be reversed.

I was a party to that judgment; but I must say, as my Brother MOORE has stated, that the case below was not argued upon the true ground, but was put upon the doctrine of remitter—a doctrine plainly not applicable to the case.

TORRENS, J.

In this case, I am of opinion that the judgment of this Court, on the facts found by this special verdict, should be given for the plaintiff in error.

The question is a short one, depending mainly on the construction to be put on the 9th section of the 4 & 5 W. 4, c. 92—an Act for the Abolition of Fines and Recoveries in Ireland; the 9th section of which, amongst other things, enacts, that:—"the provisions of the statute shall not render valid any fine or common recovery as to lands of which any person should, *at the time* of the passing of the Act, be in possession in respect of any estate which the fine or recovery would have barred." This enactment leads directly to the inquiry—what estate in possession had Netterville Davies in the several denominations of land in the ejectment and special verdict stated, at the time of the passing of the statute of 4 & 5 W. 4, c. 92—namely, the 15th of August 1834? and, in answer to that inquiry, I am of opinion that, upon the true construction of the deeds and acts found by, and appearing

upon, the special verdict, Netterville Davies took an estate tail in possession at the time mentioned, of all the lands comprised in the recovery, presuming that the recovery, for the reasons assigned and admitted at the Bar, was invalid.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

It appears, on the special verdict that, by the original settlement of the 19th of April 1769, Geoffry Davies (the elder), being seised in fee of the several denominations of land comprised in the ejectment, on the occasion of the marriage of his only son Thomas Davies (the elder), the grandfather of the present plaintiff in error, conveyed to trustees the several estates comprised in the subsequent invalid recovery, after a life estate to himself, to the use of his son Thomas for life, with remainder to his first and other sons in tail male. The elder brothers of the father of the present lessors—namely, Geoffry and Thomas (the younger), having died in the lifetime of their father, unmarried and without issue, Netterville Davies, the father of the present lessor, became the first tenant in tail in remainder, subject to his father's life estate. His father died in 1816, and then, under the settlement of 1769, Netterville Davies became seised of an estate tail in possession; and it having been found that he entered into possession of those lands on his father's death, I am of opinion that he so entered into that possession by virtue of the limitation of the settlement of 1769; and it is found that he so continued in possession until his death in 1848, leaving the present plaintiff in error his eldest son and heir-at-law. Netterville Davies, therefore, it appears to me, was, from the year 1816 up to the year 1848, in possession of an estate tail, which, if the recovery of 1806 had been a valid recovery, would have barred; and, therefore, in the year 1834, at the passing of the statute, his title and possession came, in my judgment, within the provisions of the 9th section. There was no title in any one in the year 1834, by which Netterville Davies's possession could have been evicted; if dispossessed, he could have successfully maintained an ejectment and recovered possession: in short, he had an indefeasible title to the possession, adverse to the whole world—always taking for granted, as is admitted, that the recovery of 1806 was invalid.

It is contended, however, on the part of the defendant in error,

H. T. 1853.

*Esch. (ham.)*

DAVIES

v.

D'ARCY.

that, by the legal operation of the deeds of 1806 and 1810, and the acts of the several parties to those deeds, and of Netterville Davies himself, that though it be true that under the settlement of 1769, and the limitations thereof, Netterville Davies would have taken an estate tail in remainder and in possession on the death of his father, yet that the effect and legal operation of the deeds of 1806 and 1810 was such as to convert that estate tail into a base fee, and that such an estate, thus created, would not be barred by the recovery. Now, it is to be observed, that no authority has been cited to sustain this position, of which I am at present aware; nor do I think, on principle, can such doctrine be sustained. I conceive that every act, whether tortious or otherwise, of a tenant in tail enlarging his estate beyond his legal power, and thereby creating a new estate or base fee, must follow the incidents of the estate out of which it is derived; and it being the incident of an estate tail to be barred by a common recovery, I hold that and all and every estate derived from or out of it must be subject to the same consequence. I have not myself been able to find any authority directly upon the point; but my Brother GREENE has referred me to *Capel's case* (a), and to *Cholmondely's case*, which appear to me to bear on the question on which he and my Brother BALL have already commented.

It may not, perhaps, be unimportant to observe that, in the interpretation glossary of the statute now under discussion, it is stated "that the expression 'estate tail,' in addition to its usual meaning, "shall mean a base fee into which an estate tail shall have been "converted;" and, therefore, coming within the incidents to which an estate tail is subject.

There can be no doubt but the Act in question is, as my Brother MOORE has stated, a remedial Act, and as such, in a case of doubt, is to be construed liberally; but, on the other hand, it is to be recollected that it is a retrospective statute in many respects; and our law entertains a just jealousy of retrospective enactments disturbing established rights and unbroken possession; and here, where there has been a long and undisputed possession under a

(a) 2 Rep. 154.

title which the Court sees to be clear and definite, I do not think that possession should be disturbed by inferences drawn from equivocal Acts.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

What effect the doctrine of estoppel might have had as against Netterville Davies himself, that doctrine cannot affect his issue in tail, the present lessors.

On the whole of the case, I am therefore of opinion that judgment should be given for the plaintiff in error, as to all the lands comprised in the ejectment.

PENNEFATHER, B.

This case has been argued and discussed by my Brethren at considerable length, and many topics have been argued as if they admitted a doubt, which, in my mind, are clear and incontrovertible. That a conveyance by a tenant in tail, by lease and release, gives a base fee; that a recovery duly suffered bars not only the estate tail, but all remainders and reversions, and portions of remainders and reversions, I do not controvert; the law on that subject has been long since settled, and we are not now to be called on to raise questions which, for many years, have been considered as settled beyond a doubt.

The question entirely depends upon the construction to be put on the statute. It was passed for the purpose of abolishing proceedings by fine and recovery, and validating those assurances in case of defects more of form than of substance. Accordingly, the 5th, 7th and 8th sections remove these objections, which might have existed, not only with regard to the estate conveyed, coupled with the possession, but also with regard to conveyances when the possession was not intended to pass—I mean mortgages, and such like; in such cases the invalid recovery is made valid in the same manner as if the possession of the land had passed with the conveyance. These observations are not immaterial, when we consider the nature of D'Arcy's estate.

In 1806, Thomas Davies (the younger) being then tenant in tail, his father (tenant for life) being then alive, in that year the father and son agreed to suffer a recovery, which recovery has given rise

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

to the present question. That recovery was suffered for the purpose of barring the estate tail, and for the purpose of making a mortgage for a considerable sum. That recovery was unquestionably invalid at the time; and D'Arcy, the mortgagee, could not, after the death of the father and son, claim any thing as against those deriving under the settlement; but the defects in that recovery were cured in 1834, and that which had been invalid up to that time became, under the operation of the Act, valid. D'Arcy then had a base fee, and nothing more. If he had been in possession, he would have been in possession of a base fee, as the recovery being invalid, that conveyance by lease and release could only give a base fee. That base fee terminated in 1809, by the death of the tenant in tail; but that fact makes no difference in the view I have taken of the case.

Suppose the tenant in tail had lived until 1834, D'Arcy's estate would still have been a base fee: I mean to say, that all conveyances by a tenant in tail, where the recovery is invalid, gives only a base fee; and the argument, that a party takes under such a conveyance a portion of the tenancy in tail, must apply to every case of an invalid recovery. If you exclude this from the operation of the 5th, 6th and 8th sections, you must shut out from its operation almost every possible case, and all the remedies the statute intended. D'Arcy did not take possession—a mortgagee seldom does; but the mortgagor never could set up against him an adverse possession. Suppose D'Arcy had been in possession until 1834, and that Netterville Davies had not interfered with that possession of the mortgagee, the statute would have operated on that possession given originally by a base fee; and the base fee would have continued until avoided by the issue in tail; and D'Arcy, being in possession in 1834, and the recovery being invalid—the possession being derived out of an estate tail, in the nature of a base fee—I would ask whether that estate was not one which it was the very intention of the statute to set up? That can hardly be controverted. The words of the clause are:—"that it shall not render valid any fine or common recovery as to lands of which any person shall, at the time of the passing of this Act, be in possession in respect of any estate which the fine or common recovery, if valid, would

"have barred." Now, if D'Arcy was in possession of a base fee carved out of the remainder in tail, no doubt that would have been defeated by the recovery, if it were to be considered he held a portion of the estate tail in the nature of a base fee. But he was not, within the purview of the Act, in possession in respect of a base fee, or an estate tail, but in possession in respect to an estate that, if the recovery had been valid, would have been an estate in fee. That would have been the estate if D'Arcy had taken possession and remained in possession until 1834.

H. T. 1853.  
*Esch. Cham.*  
DAVIES  
v.  
D'ARCY.

If that be not the construction to be put on the Act, it would appear that the 9th section altogether repeals the foregoing 5th section—if not altogether, at least in so many instances as would show that the great object of the statute would be altogether frustrated.

If, then, that would be the case with regard to D'Arcy, what would be the effect of a settlement executed by Thomas Davies (the younger)? He was tenant in tail; his father had surrendered his life estate; it was therefore competent for him to have executed a settlement, supposing the recovery to be valid. Suppose that settlement had been to himself for life, remainder to Netterville Davies in tail; suppose that Thomas continued in possession until his death, and Netterville succeeded him, is it to be said, against the plain meaning and obvious intention of the settlor, who could have acquired the absolute possession, that the possession taken in remainder is not to be attributed to that settlement, but to the old settlement it was intended to have barred? Independently of the operation of the statute, in the case I put, he must have been in possession of a base fee, or of something carved out of it, which would have fallen to the ground with the tenancy in tail.

I take the meaning of this Act to be, not what the legal estate is which the party takes, but what was the estate he would have taken if the recovery had been validated. The statute does not validate the recovery; then the question arises, what was the estate the party had? My construction of the statute is, that wherever a tenant in tail, or a person who would be tenant in tail, executed a conveyance, whether by mortgage or by conveyance, intended to affect the possession, the 9th section does not apply; it was only intended to apply

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

to a case where a tenant in tail, after suffering an abortive recovery, continued in possession. Where the estate descends to his issue, without incumbrance, in such a case, the 9th section applies; but when a tenant in tail suffers an abortive recovery and dies, in default of issue, the 5th, 7th and 8th sections apply; and the case is not within the 9th section, because the party must be taken to be in possession of an estate to be validated by the recovery—not in possession of an estate which the recovery, if valid, would have been destroyed.

I have been speaking of acts done by a tenant in tail who suffers a recovery. Let us now see the effect of a settlement executed by a succeeding tenant in tail. In 1810, the settlement was made by Netterville Davies, the succeeding tenant in tail, by the person who, until the statute passed, unquestionably was still tenant in tail, the recovery being invalid; but if the recovery was valid, the estate tail was gone—all remainders out of it were gone—the base fee was gone, and he was seised in fee-simple. Under these circumstances, he would have taken the land as heir-at-law of his brother. The act of possession was not distinctly found, and although it was said he did not take possession until 1816, there is no finding to show that it was postponed until that period, and it is found that the father surrendered, therefore the right of Netterville Davies accrued in 1809, whether he then took possession or not. Being then entitled to the actual possession in fee-simple, if the recovery was valid, he executes a settlement providing a jointure for his intended wife, and making himself tenant for life, remainder in tail; and from the death of his father in 1816, until his own death, he continues in possession.

Now, I would say, that possession is to be taken not in respect of an estate which the recovery would have barred, but it is a possession which the recovery, if valid, would have made infeasible, which would have given him an estate sufficient for the issue of that settlement. He does then convey to trustees and their heirs, giving himself possession consistent with the old base fee. In point of law the estate tail was not barred; the recovery was invalid, but if valid, the settlement of 1810 would

have been free from objection. Is not this a case falling within the mischief intended to have been provided against? If the recovery were invalid, must not the possession be taken to be under that, and not under an estate tail, which it was the object of the Legislature to declare was barred, and which, but for technical defects, would have been barred? I therefore cannot help saying that my opinion would have been perfectly clear, if there were not so many of a contrary opinion. There is no case in which the question appears to have arisen. The judgment of the Court of Queen's Bench, though perhaps that judgment appears to proceed on a question of remitter, which I do not think applies very much to the case; yet it would appear that the view then entertained was very much that which I pronounce as my own, namely, that when a tenant in tail did execute a conveyance, the possession should be taken to be under that instrument, otherwise no efficacy could be given to the statute intended to remove these formal defects in recoveries. I therefore look upon that decision of the Court below—that judgment as the opinion of a most able and experienced Judge, and one which without very strong grounds I should feel very sorry to overrule. That, however, is not to be the guide of this Court; other Members of that Court have changed their opinion; and where opinions are deliberately changed, I grant they must be for important reasons. I have attended carefully to the arguments of these learned Judges. My Brother CRAMPTON appears to have gone on a fallacy. I think if the statute had not passed, *Netterville Davies* had nothing but what he must have carved out of a base fee; but by the help of the statute he was in possession of an estate derived from the operation of the recovery, and which, if valid, would have been barred. I therefore am of opinion the judgment of the Court below ought to be affirmed.

H. T. 1853.  
*Exch. Cham.*  
DAVIES  
v.  
D'ARCY.

FIGOT, C. B., concurred with PENNEFATHER, B. and MOORE, J., in opinion that the judgment of the Court below ought to be affirmed.

MONAHAN, C. J.

The several deeds stated in the special verdict have been



H. T. 1853. already referred to with such minuteness by several Members of  
*Exch. Cham.*  
the Court who have preceded me, that it will not be necessary  
DAVIES  
v.  
D'ARCY. for me again to state their contents, and I shall therefore at  
once proceed to state the grounds of the opinion which I have  
formed.

It will be necessary to have in mind what is found with respect to the possession of the lands by the late Netterville Davies. It is not found in express terms when he entered into possession, whether or not before the death of his father in 1816; but it is expressly found that he was in possession, as I take it continuously, from the death of his father in 1816 to his own death in 1848, and therefore there can be no doubt but that he was in possession at the time of the passing of the Act for abolishing Fines and Recoveries, namely, in August 1834. It is not found under what title, or claim of title, he entered and continued in possession during the period I have mentioned, nor does it appear that during that period he in any way recognised the right of the mortgagee, with whom the present litigation exists.

I do not make these observations for the purpose of raising or suggesting any question on the Statute of Limitations, but for the purpose of using it hereafter, when endeavouring to ascertain the true construction of the 9th section of the statute, on which the question in this case altogether depends.

It is not disputed that Netterville Davies' original title to the lands was as remainderman in tail under the settlement of 1760; that the previous tenant in tail died in 1809; that the previous tenant for life died in 1816, and therefore, if no act had been done by Netterville Davies, he would have been tenant in tail in possession from 1816 to 1834, and from thence to his death in 1848. It has not been contended, nor could it, that in the interval from 1816 to 1834, a period of eighteen years, D'Arcy, the mortgagee, could have maintained an ejectment against Netterville Davies, or that Netterville Davies was in any way bound by the mortgage, notwithstanding the deed of 1810; but what we are called on to decide is this, that though Netterville Davies had good title as against the mortgagee from 1816 to 1834, his title was altogether put an

end to by the Act of August 1834; and that D'Arcy, who had neither possession nor title during those eighteen years, immediately on the passing of the Act acquired title, and was of course for that purpose entitled to maintain an ejectment. If this be the clear and plain construction of the Act, we are of course bound to give effect to it; but I confess that I, for one, am not disposed to give such a construction to an Act of Parliament, unless the language of it clearly require it.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

It has been properly admitted by the Counsel for the defendant, that the objections to the recovery are such that, unless removed by the Act of 1834, neither the recovery, or deed of 1810, afford any defence to the present ejectment, nor could they to an ejectment brought by Netterville Davies if he was living. It has also, with equal candour, been admitted by the Counsel for the plaintiff, that all the defects in the recovery have been removed by the previous sections of the Act, unless Netterville Davies, who was the person in possession in August 1834, was able to bring himself within the provision of the 9th section. Though the precise portion of the 9th section which immediately applies to the present case is that relating to lands in possession of any person in respect of certain estates, I think in order to understand this exception it will be necessary to ascertain the precise meaning of the exception immediately preceding, which is in these words:—"And where any person who would have been "barred by any fine or common recovery, if valid, shall before the "passing of this Act have had any dealings with the lands comprised "in such fine or recovery, on the faith of same being invalid, such "fine or recovery shall not be rendered valid by the Act." Now it cannot escape observation, that this exception does not require the party availing himself of it to be in possession at the passing of the Act, or at the time of the dealing had; but as the dealing must be had on the faith of the invalidity of the recovery, it is of course essential that the dealing should be had subsequent to the suffering of the invalid recovery. In 1810, on the occasion of the marriage of Netterville Davies, he had executed a settlement in terms of his remainder under the deed of 1769, alleging it was

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

still in existence, and covenanting to suffer a recovery, when entitled to do so on the death of his father. I do not think it could be contended, but that such settlement would be a dealing with the land, so as to protect the estate of Netterville Davies from being affected by the invalid recovery, even though the title of D'Arcy, the mortgagee, subsisted till long after the passing of the Act of 1834, in consequence of the tenant for life living till after that period. It appears to me that the exception was introduced for the benefit of parties to whom it would be unjust to extend the general provisions of the Act, and who had a title adverse and paramount to those deriving under the invalid recovery, though their title to the possession had not accrued at the time of the passing of the Act.

Another exception in the 9th section is, that the Act shall not prejudice or affect any proceedings at law or in equity at the time of the passing of the Act, in which the validity of the fine or recovery shall be in question between the party claiming under such fine or recovery, and the party claiming adversely thereto. To these words, "claiming adversely thereto," I beg particular attention, as it occurs to me that the expression really shows who were the persons intended to be excluded from the operation of the Act; and accordingly, it could not be contended that if, at the passing of the Act, an ejectment was pending at the suit of D'Arcy the mortgagee, against Netterville Davies who was then in possession, or at the suit of Netterville Davies if he was then out of possession, against D'Arcy the mortgagee, that in either case Netterville Davies could not effectually rely on the defects in the recovery to defeat the proceedings or defence of D'Arcy, as the case might be; but the argument is, as Netterville Davies is in possession, and could not have an ejectment against himself, his title as derived under the settlement of 1760 is altogether barred. I cannot bring myself to believe that this is the true construction of the Act, or the intention of the Legislature; the intention being, in my opinion, to exclude from the operation of the Act persons having a title or estate adverse or paramount to the recovery, where such title or estate was accompanied by possession, or a proceeding to recover

that possession; or where, though unaccompanied with possession or proceedings to recover the possession, such adverse or paramount title has, before the passing of the Act, been dealt with on the faith of the invalidity of the recovery. But, leaving the Act to apply to the vast majority of cases—namely, those in which the possession at the time of the passing of the Act was in any one claiming or deriving under the invalid or informal recovery—if, therefore, in the present case, D'Arcy the mortgagee, or if Thomas Davies the mortgagor, if then alive, were in possession in 1834, supposing he had the equity of redemption in fee, had devised same to a third person, and that such third person was in possession in 1834, I conceive the Act would apply. It would in fact apply to every case, unless the lands were in 1834 in the possession of some person having a paramount and adverse title—that is, as is under another part of the same section, claiming adversely to the recovery; and, therefore, I cannot agree with the observation made by some Members of the Court—namely, that the construction contended for by the plaintiff's Counsel will make the exception as extensive as the Act.

But it, of course, remains to consider whether the words of the Act will bear the construction which I have stated. The words are—"This Act shall not render valid any fine or recovery as to lands of which any person shall, at the time of the passing of this Act, be in possession in respect of any estate which the fine or recovery, if valid, would have barred." Now, if Netterville Davies had not executed the deed of 1810, no one has argued that he would not have been in 1834 in possession under and in respect of his old estate tail, although as heir-at-law of his brother, he, perhaps, as special occupant, took an equitable estate for the life of his father Thomas, and would also have taken an equitable estate in fee-simple, and the equity of redemption, if in fact all those estates had not *ipso facto* determined by the death of Thomas, the tenant in tail, without issue. I take the distinction to be this: that the base fee created by a tenant in tail does not determine on his death if there is issue in tail, until the

H. T. 1853.  
*Exch. Cham.*

DAVIES  
v.  
D'ARCY.

H. T. 1853. entry of the issue; but if no issue, that it actually determines  
*Exch. Cham.* without the entry of the remainderman.

DAVIES  
v.

D'ARCY.

But it has been suggested that, even though the deed of 1810 had no reference to the suffering of the previous recovery, that inasmuch as the deed of 1810 converted the remainder in tail into a base fee, such base fees come not within the provisions of the 9th section. I confess I cannot accede to this. The cases already cited by my Brothers GREENE and BALL, and which I did intend referring to, establish beyond all doubt, that if a party having a vested remainder expectant on an estate tail grant any charge out of the remainder, or create any estate out of that remainder, or convert the remainder into a base fee by conveying it in fee-simple—that such acts of the remainderman do not, in the slightest degree, interfere with the right of the tenant in tail in possession to suffer a recovery; and which recovery, if duly suffered, would have the effect of altogether destroying, not merely the estate tail in remainder, and also all charges affecting it, all estates created out of it, and the base fee into which it has been converted. If, therefore, prior to the recovery of 1806, Netterville Davies had executed a deed conveying his remainder to the same uses as those limited by the deed of 1810, I cannot for one moment doubt but that the subsequent recovery, if valid, would have destroyed all those estates; and, therefore, that if any person claiming under such a settlement were in possession in 1834, the person so in possession would be a person in possession in respect of an estate which the recovery, if valid, would have barred, and, therefore, within the express words and meaning of the saving of the 9th section. The only difference between the supposed case and the present is, that in the present case the conveyance was made after the suffering of the invalid recovery; this, however, does not occur to me to be material, as the recovery, if valid, would have destroyed those estates, by rendering it impossible that they could have been created.

In my opinion, the construction of the particular exception in the 9th section of the Act, on which the question turns, is simply

this:—the recovery will be rendered valid in all cases in which the party in possession at the time of the passing of the Act was a person deriving under the recovery—that is, either the party who suffered the recovery, or some person deriving under him by conveyance, will, or otherwise; but that the Act will not have the operation of validating the recovery when the person in possession was a person under a title paramount to the recovery; that is, as issue in tail, remainderman or reversioner under the conveyance creating the estate tail.

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

The only difficulty which, in my opinion, at all exists in the present case is this, that Netterville Davies, in 1834, may be thought to have had, in fact, two titles to the possession—one as at heir-at-law of his brother, and, as such, entitled to the equity of redemption, subject to the mortgage, and also subject to his own settlement of 1810; and the other, the title as remainderman in tail, as derived under the settlement of 1760: and there is no finding by the jury, in respect of which of those estates he was in fact in possession in 1834. It occurs to me, however, that the fact being found as to how the title in fact was, the law will determine that the possession was in accordance with that title; and though the law of remitter is not properly applicable, there not being in fact two continuing estates, yet, that an analogy may be derived from it, as if the effect of the recovery of 1809 was even to create a discontinuance, and that an actual legal base fee were thereby created; and that the legal base fee so created descended on Netterville Davies as heir-at-law of his brother, even though he assented to the estate so cast upon him by descent, or charged it; yet, that inasmuch as the estate so vested in him came to him by act in law, and not by his own act, still he would be remitted to his old estate tail, when same would become afterwards vested in him. This, I think, clearly appears from *Litt.*, s. 660, and the commentary of Lord Coke. Therefore, in the present case, though I think it highly probable that when Netterville Davies executed the settlement of 1810, he was under the impression that his title to the estate was derived from his brother; and under the recovery of 1809, he being then in possession,

H. T. 1853.  
*Exch. Cham.*  
 DAVIES  
 v.  
 D'ARCY.

the law referred it to the title under the settlement of 1760, and therefore, that in 1834 he was in possession under a title paramount or adverse to the recovery; and therefore, that as against him so in possession, the recovery was not rendered valid by the Act of 1834, and therefore, that the judgment of the Queen's Bench must be reversed.

LEFROY, C. J.

The question in the case arises upon the 9th section of 4 & 5 W. 4, c. 92 (the Act for the Abolition of Fines and Recoveries), providing "that this Act shall not render valid any fine or common recovery, as to lands of which any person shall, at the time of the passing of this Act, be in possession in respect of any estate which the fine or common recovery, if valid, would have barred." By some of the previous sections, provision is made for giving effect to recoveries, notwithstanding certain defects or informalities which would otherwise have vitiated them; but this relief is given under certain limitations and qualifications contained in the 9th section. Amongst these is the one before mentioned, which, it is contended, applies to the present case, and takes it out of the benefit of the previous sections, which, it is admitted, would otherwise cure the defects in the recovery. This saving is made in favour of persons claiming adversely to the recovery, and who had, at the time of the passing of the Act, a possession adverse to the recovery. For the purpose of this saving, therefore, we are not to consider what the recovery would effectuate, if valid, but what, if valid, it would bar. It would give effect indeed to all estates derived out of the newly-acquired fee; but it would have destroyed all the pre-existing remainders and reversions, and all estates derived out of them, and consequently would have barred the estate derived out of the remainder in tail. It only requires to state the well-known effect of a common recovery in barring, not only the estate tail and all remainders and reversions, but also all estates derived out of them, to bring the present case within the first branch of the test by which the application of this saving in

the 9th section is to be determined. It is plain, from the character of the savings in this section, that it was intended to confine the operation of the former sections (validating imperfect recoveries) to estates derived out of the recovery and in privity with it, which was a reasonable measure; but not an *ex post facto* law, to give effect to recoveries against those claiming adversely to the recovery—that is, those having remainders or reversions, or estates derived out of them, and having a possession under such an adverse title at the time of the Act passed. Now, the possession in this case was of that character at the time of the passing of the Act. It was a possession by virtue of an estate derived out of a remainder in tail, which would undoubtedly have been barred by the recovery, if valid.

The case is, therefore, brought within the saving, both as to the nature of the estate and the possession required by the saving; and in my opinion, the judgment below was wrong, and ought to be reversed.

Judgment reversed.

H. T. 1858.

Exch. Cham.

DAVIES

v.

D'ARCY.





# INDEX.

## ABATEMENT.

*See* PLEA IN ABATEMENT.

## ACCOUNT STATED.

"To support an account stated, it is essential that there should have been a previous debt or dealing on which a liability existed."—*Per* PIGOT, C. B. *E. Rainsford v. Eagar* 124

## ACT OF PARLIAMENT.

*See* STATUTE.

"It is a well established rule of law, that in a grant, if the exception be as large as the grant, the exception will be void, because it would be absurd to construe a grant as giving with one hand, and taking back with the other. The same principle is applicable to the construction of Acts of Parliament: It is a rule in construing an Act of Parliament, that if following literally the words used, it would lead to an absurdity, the Court would so modify and control these words as would prevent that absurdity."—*Per* MOORE, J. *Ex. Ch. Davies v. Darcy* 638

## ACTION.

*See* PLEADING.

## ADMINISTRATOR.

*See* CLERGY.

## AFFIDAVIT.

*See* ATTORNEY.

CERTIORARI.

EJECTMENT.

FIAT.

JUDGMENT.

JURY.

SECURITY FOR COSTS.

1. When affidavits are filed as cause against a conditional order, a motion

to show cause is irregular. Q. B. *O'Donnell v. O'Donnell* 29

2. An affidavit detailing such facts as would sustain a bill of discovery prior to the passing of 14 & 15 Vic., c. 99 (Evidence Act), will entitle the applicant to inspect the documents referred to in the affidavit. Q. B. *M'Cay v. Magill* 83

3. An affidavit made in another cause, in which the plaintiff in the present cause was also plaintiff—*Held*, inadmissible to ground a motion in the second cause. Q. B. *Dowling v. Sadleir* 603

## AGREEMENT.

*See* INDEMNITY.

## TROVER.

Where an agreement has been acted on, so that the parties to it cannot be restored to their original position, money paid under it by one party to the other cannot be recovered in an action of debt for money lent and on the account stated, although the plaintiff has taken I O Us for the sums so advanced to the defendant; and that, too, although the agreement may not have been fully carried out, and may not be such a one as would be directly enforceable by reason of the Statute of Frauds: the consideration for the I O Us so given is examinable. *E. Rainsford v. Eagar.* 120

## AMENDMENT.

*See* IRREGULARITY.

JUDGMENT.

PLEADING.

SHERIFF, 5, 7.

A motion to amend a *postea* must be made to the Judge by whom the

case has been tried ; to amend the judgment in accordance therewith, to the Court of which it is a judgment, and to amend the transcript, where it is before a Court of Error, to the Court of Error. *Anon.* Cham.

119

## APPEAL.

*See* COSTS.

JURISDICTION.

POOR-LAWS, 2.

REGISTRY APPEAL.

## APPRENTICE.

*See* ARBITRATION.

ATTORNEY.

AWARD.

## ARREST.

*See* JUSTICE OF THE PEACE.  
SHERIFF.

## ASSIGNEE.

*See* BANKRUPT.

JUDGMENT.

SCIRE FACIAS.

SUGGESTION.

## ASSIGNMENT.

*See* ASSIGNEE.

## ASSISTANT-BARRISTER.

*See* CRIMINAL LAW.

QUARTER SESSIONS.

## ASSUMPSIT.

*See* PLEADING.

## ATTACHMENT.

An attachment will not be granted against a witness for non-attendance at a trial, pursuant to a subpœna, unless he be called in Court by the crier, and a note taken of his non-attendance by the Judge's registrar. Q. B. *O'Donnell v. O'Donnell* 29

## ATTORNEY.

*See* JUDGMENT.

WARRANT OF ATTORNEY.

1. This Court has jurisdiction to admit as an attorney a person who has not served the ordinary apprenticeship,

## BANKRUPT.

on payment of the general fees. The exercise of this jurisdiction, which is rare, depends on the peculiar circumstances of each case. A practising Barrister was admitted as an attorney, without serving an apprenticeship, to wind up the business of his deceased brother, who was killed by an accident on a railway, he having been his brother's confidential adviser, acquainted with the suits then pending in his office, the Court being satisfied of his qualifications, and given distinctly to understand that the suits were to be conducted by him for the benefit of the family of the deceased. E. *In re M'Nally* 518

2. An attorney retained for the conduct of a Chancery suit, and accepting such retainer, thereby enters into a specific contract to carry on the proceedings, and cannot, without due notice, and before the suit is terminated, rescind that contract, and sue on a *quantum meruit*. Q. B. *Copping v. Synnott* 563

3. A person having been admitted an attorney, under very peculiar circumstances, without having served an apprenticeship, the order so admitting him was subsequently rescinded, on the ground of the suppression by him of a prominent fact amongst the circumstances on which his application was based, although the suppression did not appear to be with the intention of misleading or deceiving the Court. The utmost candour, and the most full disclosure of facts are required by the Court upon such applications, which are most exceptional in their character. E. *In re M'Nally* 576

## AWARD.

*See* PLEADING, 7.

## BANKRUPT.

*See* INDEMNITY.

LANDLORD AND TENANT.

SHERIFF.

TROVER.

## BARRISTER.

### BARRISTER.

See ASSISTANT-BARRISTER.  
ATTORNEY.

## BILL OF EXCEPTIONS.

1. Case, by a corporation, as proprietors of Government stock, against the Bank of Ireland, for refusing to transfer this stock, and for permitting it to be transferred without their authority. The stock had been transferred under forged letters of attorney, purporting to be under the common seal of the corporation, which their agent had affixed to the letters of attorney, without their knowledge or consent, and for which he had been prosecuted by the corporation, and convicted.

The Judge told the Jury, if they believed the evidence, the letters of attorney were forgeries, and that believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclusively by the neglect or default of the plaintiffs; and that in considering whether the use so made of the common seal was the exclusive cause of the imposition and fraud practised on the defendants, they should consider whether there was any neglect or default on the part of the defendants in examining the letters of attorney, or inquiring into their genuineness; and if they were of opinion that there was such neglect or default, and that same in any degree contributed to said imposition and fraud, they should find for the plaintiffs. The plaintiffs excepted to this charge, and required the Judge to tell the jury that the documents being forgeries, they should find for the plaintiffs, notwithstanding the allegation of default or neglect by the plaintiffs; and also to direct the jury, that if they believed on the evidence that the plaintiffs did not previously au-

## BILL OF EXCEPTIONS. 671

thorise, and were not privy to, the affixing of the seal to the letters of attorney, and did not, by any subsequent act, adopt them, they should find for the plaintiffs. *Held*, on error from the Court below, allowing the exceptions, that the charge of the Judge was wrong, and that the exceptions were properly allowed.— (*Dissentiente*, PIGOT, C. B.) Ex. Ch. *Bank of Ireland v. Evans' Charities* 280

2. Upon a bill of exceptions taken by the plaintiffs to the charge of the Judge, the Court below awarded a *venire de novo*, upon which a verdict was had for the plaintiffs, the defendants not appearing, and judgment was entered thereon. The defendants brought a writ of error on this judgment. The transcript of the record returned into this Court by the Court below omitted the proceedings on the first trial, the bill of exceptions and judgment thereon by the Court below, merely entering continuances of *vice comes non misit breve* from the award of the first *venire* to the entry of the verdict on the second trial. The plaintiffs in error alleged diminution, and this Court held that they were entitled to have those matters returned as part of the record. *Ibid*

3. *Held*, that the statute 28 G. 3, c. 31, having incorporated the exceptions into the *postea*, thereby made them part of the record, and that this Court was bound to consider them. (*Dissentientibus*, CRAMPTON, J., and PERRIN, J.) *Ibid*

4. *Kennedy v. Gregg* (10 Ir. Law Rep. 559) commented on and doubted. *Ibid*

5. A bill of exceptions should state what directions the Judge gave on the particular issue raised, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. H. L. *Anderson v. Fitzgerald* 475

672 BILL OF EXCHANGE.

BILL OF EXCHANGE.

See EVIDENCE.

FOREIGN LAW.

BOND.

See BREACHES.

BREACHES.

See SUGGESTION OF BREACHES.

BURGESS.

See REGISTRY APPEAL.

CAPIAS AD SATISFACIENDUM.

See EVIDENCE.

PLEADING, 3.-

SHERIFF.

1. *Semble*.—The voluntary discharge of a debtor, in custody under a *ca. sa.* issued on foot of a judgment, does not deprive the creditor of his right to issue another execution under the statute 35 G. 3, c. 30. Q. B. *Burns v. O'Leary* 1
2. A plaintiff in a cause, having obtained the costs of two interlocutory motions, each under the sum of £10, will not be allowed to consolidate the two sums, and thereby entitle him to issue a *ca. sa.*, as such would be an evasion of 11 & 12 Vic., c. 28. Q. B. *Waldron v. Jones* 34

CERTIORARI.

See CORONER.

SETTING ASIDE PROCEEDINGS.

1. A *certiorari* lies to remove an order made by a Justice of the Peace, under the Petty Sessions Act, when the order was made without jurisdiction. Q. B. *Regina v. Campbell* 586
2. All orders made under this Act should be signed by the Justice, and should show, on the face of them, that he had jurisdiction to make the order. *Ibid*
3. In showing cause against an order *nisi* for a *certiorari*, it is no objection to the affidavit on which it was obtained, that it is not entitled in the cause. The affidavit, although sworn by a marksman, is not objectionable, because of the omission in the jurat

CHOSE IN ACTION.

by the officer, that the deponent understood what was sworn to. Q. B. *Regina v. O'Brennan* 589

4. The conditional order is properly drawn up, by naming the prosecutor in the Court below the defendant in the order. *Ibid*
5. A writ of *certiorari* will be granted to return a charge, information and recognizance, on the application of a person arrested and bound over to keep the peace, on an information sworn before a police magistrate, though the applicant be not in actual custody, and not before the Court under a writ of *habeas corpus*. The writ will be granted even though it lead to ulterior proceedings against the Justice whose conduct is the subject-matter of inquiry. *Ibid*

CHARGING ORDER.

1. This Court will grant a charging order on a sum of money lodged in the Incumbered Estates Court to the credit of a judgment debtor. C. P. *Browne v. Ellis* 106
2. Where the defendant as executrix had recovered judgment against a third party, for a sum lodged in Court to the credit of the action, the Court, at the instance of a creditor who had obtained a judgment against the defendant as executrix, granted an order to charge that sum, pursuant to the 16 & 17 Vic., c. 113, s. 135. C. P. *Buckley v. Devereux* 107
3. Where the defendant, as executrix, had obtained a judgment against a third party for a sum of money, lodged in Court to the credit of the action, the Court refused to charge that sum with the payment of a judgment recovered against the defendant personally, there being nothing to show that she had a beneficial interest in the sum lodged in Court. C. P. *Butler v. Devereux* 108

CHOSE IN ACTION.

See EVIDENCE.

FOREIGN LAW.

## CIVIL-BILL.

### CIVIL-BILL.

*See CRIMINAL LAW.*

### CLAIM.

*See REGISTRY APPEAL.*

### CLERGY.

*See MANDAMUS.*

### POOR-LAWS.

The personal representative of an incumbent, who, for the purpose of building a glebe-house, has borrowed from the Board of First Fruits a sum equal to two years' income of his benefice, cannot recover from the succeeding incumbent as a charge on the benefice under the Ecclesiastical Building Acts (10 *W.* 3, c. 6; 12 *G.* 1, c. 10; 11 & 12 *G.* 3, c. 17) a further sum, amounting to two years' income, which the intestate expended pursuant to the said Acts. Neither can he recover a sum equal to the difference between two years' income of the benefice and the balance of the loan due at the time of the induction of the succeeding incumbent. *C. P. Carr v. Harpur* 258

## COMMISSIONERS OF DRAINAGE.

1. By 5 & 6 *Vic.*, c. 89, s. 60, it is provided that if any existing bridge, culvert, &c., for the discharge of water, under any public or county road, be insufficient for that purpose, and thereby cause the flooding of, or injury to, any land to be drained by the works directed under the Board of Works, or when by reason of such works, any road is relieved from periodical flooding, it shall be lawful for the Commissioners to have the same re-constructed, and to determine, by a declaration under their hand and seal, the proportion of the expense of such re-construction or relief from flooding, which shall be defrayed by the county or counties respectively, or any barony or half barony of such counties within which such bridge, &c., may be situate. A declaration made by the Board of

## COMMISSIONERS, &c. 673

Works under this section as to the amount to be levied off the county or barony is not conclusive on the county or barony; but the sum properly payable by the county and barony is to be determined on a traverse to the presentment. *Ex. Ch. Ex parte Drainage Commissioners* 140

2. Case, by a mill-owner against the Commissioners of Drainage in Ireland, for having made a canal and tap-drain, and set up obstructions in the mill-stream water, whereby the working power of his mill was injuriously affected, both by the amount of head-water being lessened, and by throwing back-water on the wheel. The declaration did not charge the Commissioners with negligence or want of skill in the execution of the works. The works were of two kinds—drainage simply, and navigation and drainage combined; and the injuries complained of were connected with both species of operations. The works had been undertaken under the provisions of the 5 & 6 *Vic.*, c. 89, and 9 *Vic.*, c. 4. The defendant gave in evidence at the trial the publication of the final notice in *The Dublin Gazette*, pursuant to those statutes, and contended that it was conclusive of all preliminaries having been performed, and that it conferred jurisdiction; but admitted that no declaration, as required by the 5 & 6 *Vic.*, c. 89, s. 33, had, in fact, been made or served upon the plaintiff; also, that a declaration was not necessary under the provisions for summary proceedings of 9 *Vic.*, c. 4; also, that the action at Common Law was taken away by 5 & 6 *Vic.*, c. 89, s. 38, and by 9 *Vic.*, c. 4, s. 18; and called for a nonsuit. The Judge refused to nonsuit, and the plaintiff obtained a verdict.—*Held*, that the publication of final notice did not cure the want of a declaration, and confer jurisdiction. *E. Malley v. Hornsby* 381

3. *Held also*, that a declaration was necessary to confer jurisdiction, where mills or factories were interfered with,

## 674 COMMISSIONERS, &c.

notwithstanding the provisions for summary proceedings. *E. Malley v. Hornsby* 381

4. *Held also*, that the provisions for summary proceedings applied to drainage alone, and not to navigation connected with drainage. *Ibid*
5. *Held also*, that the action at Common Law was not taken away by these statutes, when the Commissioners acted without jurisdiction. *Ibid*
6. *Quere*—Whether the Commissioners can invest themselves with jurisdiction, even though to lessen the amount of the working water-power of a mill; and if they do so, whether an action at Common Law does not lie? *Ibid*

### COMMITTAL.

*See* INSOLVENT COURT.

### COMMON LAW PROCEDURE ACT.

*See* AFFIDAVIT.

CHARGING ORDER.

EJECTMENT.

PLEADING.

SECURITY FOR COSTS.

SERVICE OF PROCESS.

1. Where an action had been commenced prior to the passing of the Common Law Procedure Act, it may be continued, under the law then in force. Q. B. *M'Cay v. Magill* 83
2. The 31st section of this Act is mandatory, and applies to actions of ejectment. Q. B. *Vandeleur v. Smith* 86
3. The practice under the 16 & 17 Vic., c. 113 (the Common Law Procedure Act), as to charging funds standing in the name of the Accountant-General of the Incumbered Estates Court, at the suit of a judgment creditor of a party interested therein. C. P. *Browne v. Ellis* 106

### CONDITIONAL ORDER.

*See* MOTION.

### CONSENT FOR JUDGMENT.

*See* JUDGMENT.

## COSTS.

### CONSIDERATION.

*See* AGREEMENT.

INDEMNITY.

### CONTEMPT.

*See* INSOLVENT COURT.

### CONTRACT.

*See* ATTORNEY.

EVIDENCE.

FOREIGN LAW.

INDEMNITY.

### CONVEYANCE.

*See* FINE AND RECOVERY.

INCUMBERED ESTATES.

### CONVICTION.

*See* CRIMINAL LAW.

### CORONER.

The finding of a Coroner's jury can only be quashed for defects apparent on the face of the inquisition, or for the misconduct of the Coroner. An allegation, therefore, of the insufficiency of the evidence returned by the Coroner to support the finding, is not ground adequate to rest an application to set aside the inquisition. Q. B. *In re Casey* 22

### CORPORATION.

*See* EVIDENCE.

PLEADING.

## COSTS.

*See* JURY.

SECURITY FOR COSTS.

SETTING ASIDE PROCEEDINGS.

1. A plaintiff in a cause, having obtained the costs of two interlocutory motions, each under the sum of £10, will not be allowed to consolidate the two sums, and thereby entitle him to issue a *ca. sa.*, as such would be an evasion of 11 & 12 Vic., c. 28. Q. B. *Waldron v. Jones* 34
2. To an action of trespass *de bonis asportatis*, the defendant pleaded the general issue, and a special plea. The

## COSTS.

plaintiff replied specially to the latter, and on demurrer to the replication obtained judgment. No trial of the issues in fact having taken place, the Court refused an application by the plaintiff that the costs of the demurrer should be taxed and set off against the costs on the issues in fact, he undertaking to permit judgment to be entered on the latter for the defendant. C. P. *Lenahan v. Fitton* 111

3. The Court will not review the taxation of its officer in a matter purely for his discretion, and where he has transgressed against no legal principle. E. *Thomas v. Mannix* 128

4. Where an action for false imprisonment had been instituted under the old practice, by summons and declaration, and a plea of the general issue had been filed, and verdict, judgment and rule on *postea* entered under that system, though the trial was not had until after the passing of the Common Law Procedure Act, and the plaintiff recovered but £5, and the Judge refused to certify that it was a fit case for the Superior Courts:—*Held*, that as the 14 & 15 *Vic.*, c. 27, s. 40, which only entitles the plaintiff to costs if he recover above £5, being in force at the institution of the action, though repealed previous to the trial, the defendant was entitled to the benefit of the section, and plaintiff was not entitled to costs. Q. B. *Morgan v. Potter* 234

5. In an action commenced before the 1st of January 1854, the defendant had obtained an order for a special jury, which was struck accordingly. The plaintiff afterwards entered a rule to discontinue.—*Held*, that the defendant was entitled, as against the plaintiff, to the costs of the special jury. C. P. *Johnson v. M. G. W. Railway Co.* 251

6. Costs are not given in an appeal motion from the decision of the Judge in chamber, when the Court differs from him in opinion. C. P. *Rodocanachi v. Soderholm* 531

## CRIMINAL LAW. 675

### COVENANT.

*See* EVIDENCE, 13, 14.

### CRIMINAL APPEAL.

*See* CRIMINAL LAW.

### CRIMINAL LAW.

1. On the trial of an indictment for a libel, the jury, at the close of the first day's proceedings, separated without any order to that effect, or without the assent of the plaintiff or defendant thereto being required, and assembled next morning, when the defendant's Counsel objected, in consequence of such separation, that the trial ought not to be proceeded with, but the Judge ruled against the objection, and ordered the trial to be proceeded with.—*Held*, that this did not amount to a mis-trial. Q. B. *Regina v. Wallace* 38
2. The Judge told the jury that they must find the publication malicious, but that *prima facie* it was a presumption of law that if a man published a libel on another, it was done maliciously.—*Held*, no misdirection. *Ibid*
3. An indictment charged the prisoners with stealing 40lbs. weight of mutton, the property of some persons unknown; the evidence was, that one of the prisoners, in answer to the constable, if he had any mutton in his house, replied, "that his house was seldom without mutton, to his grief;" that mutton was found in a box in the room where the prisoner was, and in the adjoining cow-house two other of the prisoners were found lying behind one of the cows; and that in examining the wall of the cow-house, a cavity was discovered, where 30lbs. of mutton were found. Evidence was given that sheep-stealing was common in the neighbourhood.—*Held*, that this evidence was sufficient to warrant the Judge in sending the case to the jury, that the mutton so found had been stolen by the prisoners.—[*Prigot, C.B., dissentiente.*]—Cr. Ap. *Regina v. Redmond* 494



4. *Held also*, that though there was no evidence of identification of the mutton, yet the indictment describing it as belonging to persons unknown was sufficient.—[*Pigot, C. B., dissentiente.*—*Cr. Ap. Regina v. Redmond* 494

5. An indictment for perjury charged that a civil-bill came on to be tried in due form of law, and was tried by the Assistant-Barrister for the county, on which trial the prisoner (being defendant in the civil-bill) appeared, and was then and there duly sworn before the Assistant-Barrister, he having sufficient and competent authority to administer said oath. *Cr. Ap. Regina v. Lawler* 507

6. *Held*, that the indictment was sufficient; and that it was not necessary to aver that the civil-bill was for a cause of action within the jurisdiction of the Civil-bill Court. *Ibid*

7. *Held also*, that the Court of Quarter Sessions had jurisdiction to try a case of perjury. *Ibid*

8. *Held also*, that the Barrister had jurisdiction to award the costs and expenses of such prosecution to the prosecutor. *Ibid*

## CUSTODY.

*See* INSOLVENT COURT.

## DAMAGES.

*See* EVIDENCE.

## DEFENCE.

*See* PLEADING.

SETTING ASIDE PROCEEDINGS.

## DEMURRER.

*See* COSTS.

PLEADING.

## DEVISE.

*See* WILL.

## DIMINUTION.

*See* BILL OF EXCEPTIONS.  
EVIDENCE.

## EJECTMENT.

## DISCONTINUANCE.

*See* COSTS.

SPECIAL JURY.

## DISTRESS.

*See* POOR-LAWS, 1, 2.

## DRAINAGE.

*See* COMMISSIONERS OF DRAINAGE.

## ECCLESIASTICAL LAW.

*See* CLERGY.

## EJECTMENT.

*See* EVIDENCE.

INCUMBERED ESTATES.

WILL.

1. A lease for years was made by plaintiff and B to three lessees, who were dead at the time of the ejectment being brought. The defendant was in possession of the premises, and derived under the lessee who last died. No payment of rent was proved, nor was there any evidence to connect the defendant with the lease. A nonsuit being called for on the part of the defendant, on the ground that the plaintiff's right of entry was barred by 3 & 4 W. 4, c. 27, the Judge nonsuited, and the jury having been discharged without ascertaining the rent due:—*Held*, that the nonsuit was wrong, because a right of entry accrued with every successive gale of rent. *Q. B. Spratt v. Sherlock* 69

2. *Held also*, that, pursuant to 4 G. 1, c. 5, s. 3, the jury ought to have ascertained the amount of rent due. *Ibid*

3. The 31st section of the Common Law Procedure Act applies to actions of ejectment, and the provisions of it are mandatory, and service of the plaint will not be held good, where the indorsement on the writ is not made within the time limited by that section. *Q. B. Vandeleur v. Smith* 86

4. In an ejectment on the title, brought by direction of the Court of Chancery, to try the validity of a deed, the Court refused liberty to the plaintiff to file an

## EJECTMENT.

affidavit of service, omitting the words, "who is in possession of the lands sought to be recovered, or any part thereof;" although his affidavit stated it was not intended to disturb the occupying tenants. *C. P. Largan v. Largan* 117

5. An *habere* will be allowed to issue after verdict, where one of the defendants gave consent for judgment. *Q. B. Murphy v. Toohey* 228

## ERROR.

*See BILL OF EXCEPTIONS.*

- A plaintiff in error must enter into a recognizance in a sum sufficient to cover *double* the amount of the taxed costs of the opposite party, as well as double the amount of his damages; and if the recognizance fall short of that sum, the party who has obtained judgment below will be allowed to issue execution on foot of it. *C. P. Scott v. The Midland Railway Co.* 467

## ESTATE.

*See FINE AND RECOVERY.*

LANDLORD AND TENANT.  
WILL.

## ESTOPPEL.

*See FINE AND RECOVERY.*

## EVIDENCE.

*See CORONER.*

1. On an indictment for a libel, the Judge told the jury that they must find the publication malicious, but that *prima facie* it was a presumption of law that if a man published a libel of another, it was done maliciously.—*Held*, no misdirection. *Q. B. Regina v. Wallace* 38
- "2. The meaning of malice is, that when an injury is done—such as a libel does to an individual—the presumption of the law always is this, that the act so done is malicious, unless either by the circumstances of the publication itself, or by extrinsic evidence, the primary presumption of malice is rebutted. Now,

## EVIDENCE.

677

I do not mean to say that malice is not a question for the jury; undoubtedly it is a question for the jury: but what we are now considering is, how is that question to be maintained in evidence?—and if the primary evidence establish that the act is libellous and injurious, the jury are bound, under the direction of the Judge, to presume malice in the first instance. The presumption of law always is that a man intends what his voluntary act imports. The rule is precisely the same in civil as in criminal cases, and the objection seems to me to be founded upon a mistake which is extremely common in trials of this kind—namely, that the malice, which is the object of the charge in the indictment, is *personal* ill-will on the part of the defendant towards the prosecutor. It is no such thing. The wilful or voluntary doing of the injurious act, I will not say is malice, but is the *evidence* of malice, which the jury are called on to find as a malicious act of the defendant. There can be no doubt that the presumption to which I refer can be a legal presumption only. There is a primary presumption that every man is innocent, and to that presumption every defendant is entitled. The second presumption is, that every act is malicious, if it be done wilfully and injuriously; but that may be explained; it may be rebutted. A publication which is on the face of it a libel, and injurious to the person assailed, may have been published innocently, and that may be shown, as I before stated, either by circumstances accompanying it, if any such there be, or by evidence extrinsic." —*Per CRAMPTON, J.* *Id.* 44

3. "With respect to the question of malice, I hold that malice is an essential ingredient in a libel, and the late statute recognises this to be so. Malice consists in the intention to effect the injury and mischief imputed. What a man intends is to

be inferred from what he does. If the terms of a document are calculated to injure, the intent may be inferred without the aid of extrinsic evidence. Such an inference the defendant may rebut, by adducing evidence to prove that the publication took place under circumstances which rebut the inference of malice; but, in the absence of such proof, the natural consequence of the words must ensue. We cannot dive into the heart of man. We must draw our conclusions as to his intentions from over-acts, if such intention be apparent upon their face, and no evidence be adduced to rebut the inference."—*Per PERRIN, J. Regina v. Wallace* 46

4. An affidavit detailing such facts as would sustain a bill of discovery prior to the passing of 14 & 15 Vic., c. 99 (Evidence Act), will entitle the applicant to inspect the documents referred to in the affidavit. *Q. B. M'Cay v. Magill* 83

5. Case, by a corporation, as proprietors of Government stock, against the Bank of Ireland, for refusing to transfer this stock, and for permitting it to be transferred without their authority. The stock had been transferred under forged letters of attorney, purporting to be under the common seal of the corporation, which their agent had fixed to the letters of attorney, without their knowledge or consent, and for which he had been prosecuted by the corporation and convicted.

The Judge told the jury, if they believed the evidence, the letters of attorney were forgeries, and that believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclusively by the neglect or default of the plaintiffs; and that in considering whether the use so made of the common

seal was the exclusive cause of the imposition and fraud practised on the defendants, they should consider whether there was any neglect or default on the part of the defendants in examining the letters of attorney, or inquiring into their genuineness; and if they were of opinion that there was such neglect or default, and that same in any degree contributed to said imposition and fraud, they should find for the plaintiffs. The plaintiffs excepted to this charge, and required the Judge to tell the jury that the documents being forgeries, they should find for the plaintiffs, notwithstanding the allegation of default or neglect by the plaintiffs; and also to direct the jury, that if they believed on the evidence that the plaintiffs did not previously authorise, and were not privy to, the affixing of the seal to the letters of attorney, and did not, by any subsequent act, adopt them, they should find for the plaintiffs.

*Held*, on error from the Court below, allowing the exceptions, that the charge of the Judge was wrong, and that the exceptions were properly allowed. (*Dissentiente PIGOT, C. B.*) *Bank of Ireland v. Evans' Charities* 280

6. Upon a bill of exceptions taken by the plaintiffs to the charge of the Judge, the Court below awarded a *venire de novo*, upon which a verdict was had for the plaintiffs, the defendants not appearing, and judgment was entered thereon. The defendants brought a writ of error on this judgment. The transcript of the record returned into this Court by the Court below omitted the proceedings on the first trial, the bill of exceptions and judgment thereon by the Court below, merely entering continuances of *vice comes non misit breve* from the award of the first *venire* to the entry of the verdict on the second trial. The plaintiffs in error alleged diminution, and this Court held they were entitled to have those matters returned as part of the record. *Ibid*

## EVIDENCE.

6. *Held*, that the statute 28 G. 3, c. 31, having incorporated the exceptions into the *postea*, thereby made them part of the record, and that this Court was bound to consider them. (*Dissentientibus* CRAMPTON, J., and PERRIN, J.) *Ibid*
7. *Kennedy v. Gregg* (10 Ir. Law Rep. 559) commented on and doubted. *Ibid*
8. Case, by a mill-owner against the Commissioners of Drainage in Ireland, for having made a canal and tap-drain, and set up obstructions in the mill-stream water, whereby the working power of his mill was injuriously affected, both by the amount of head-water being lessened, and by throwing back-water on the wheel. The declaration did not charge the Commissioners with negligence or want of skill in the execution of the works. The works were of two kinds—drainage simply, and navigation and drainage combined; and the injuries complained of were connected with both species of operations. The works had been undertaken under the provisions of the 5 & 6 Vic., c. 89, and 9 Vic., c. 4. The defendant gave in evidence at the trial the publication of the final notice in *The Dublin Gazette*, pursuant to those statutes, and contended that it was conclusive of all preliminaries having been performed, and that it conferred jurisdiction; but admitted that no declaration, as required by the 5 & 6 Vic., c. 89, s. 33, had, in fact, been made or served upon the plaintiff; also, that a declaration was not necessary under the provisions for summary proceedings of 9 Vic., c. 4; also, that the action at Common Law was taken away by 5 & 6 Vic., c. 89, s. 38, and by 9 Vic., c. 4, s. 18; and called for a nonsuit. The Judge refused to nonsuit, and the plaintiff obtained a verdict. *Held*, that the publication of final notice did not cure the want of a declaration, and confer jurisdiction. *E. Malley v. Hornsby* 381  
*Held also*, that a declaration was

## EVIDENCE.

679

- necessary to confer jurisdiction, where mills or factories were interfered with, notwithstanding the provisions for summary proceedings. *Ibid*
9. *Held also*, that the provisions for summary proceedings applied to drainage alone, and not to navigation connected with drainage. *Ibid*
10. *Held also*, that the action at Common Law was not taken away by these statutes, when the Commissioners acted without jurisdiction. *Ibid*
11. *Quære*—Whether the Commissioners can invest themselves with jurisdiction, even though to lessen the amount of the working water-power of a mill; and if they do so, whether an action at Common Law does not lie? *Ibid*
12. A, by indenture, covenanted with B that he would not, without B's consent, do or agree to any act whereby any part or parts of the appointment, uses or trusts of a deed of equal date should be invalidated or prevented taking effect, and that if D should die without executing the deed, A would do all acts necessary for corroborating the indenture; and on the event of the death of D, without executing said deed, if A should refuse for six months afterwards to do such lawful acts for such corroboration, he, A, would, at the expiration of the six months, pay to B *the full value of the interest* intended to be vested in him by the deed of appointment, and all costs and damages caused by such neglect, and all sums expended on the faith of said deed of appointment. In an action brought for breach of this covenant, B giving no evidence of any actual damage sustained by him, but only evidence as to the value of the properties intended to be conveyed:—*Held*, he was entitled to damages equivalent to the benefit he might have lost, or to the loss he might have sustained by the non-performance of the covenant. *Q.B. Crommelin v. Donegal* 434

13. The words, "full value of the interest," are not to be viewed as a penalty for breaches of the covenant, being neither a specific sum of money, nor of the nature of money; they mean the full value of the interest in the beneficial produce of the properties to be embarked in the speculation. Q. B. *Crommelin v. Donegal* 434
14. An indictment charged the prisoners with stealing 40lbs. weight of mutton, the property of some persons unknown; the evidence was, that one of the prisoners, in answer to the constable, if he had any mutton in his house, replied, "that his house was seldom without mutton, to his grief;" that mutton was found in a box in the room where the prisoner was, and in the adjoining cow-house two other of the prisoners were found lying behind one of the cows; and that in examining the wall of the cow-house, a cavity was discovered, where 30lbs. of mutton were found. Evidence was given that sheep-stealing was common in the neighbourhood.—*Held*, that this evidence was sufficient to warrant the Judge in sending the case to the jury, that the mutton so found had been stolen by the prisoners.—*Held also*, that though there was no evidence of identification of the mutton, yet the indictment describing it as belonging to persons unknown was sufficient.—[*Pigot, C.B., dissentiente.*].—Cr. Ap. *Regina v. Redmond* 494
16. A writ of *ca. sa.* was lodged with the Sheriff, who arrested T. W. instead of H. W., the real debtor. Having him in custody, he took him to the establishment of the defendant (the plaintiff in the execution), who, being from home, his foreman, in answer to an inquiry from the Sheriff's bailiff, told him T. W. was the real defendant. Thereupon the Sheriff conveyed T. W. to the marshalsea; and afterwards, an application being made to discharge T. W. from custody, at the defendant's re-

- quest, the motion for the discharge of T. W. was deferred until the following day, when defendant, having discovered his mistake, notified to the Sheriff that the wrong person was in custody; and the Court discharged T. W., who then brought an action against the Sheriff for false imprisonment, and judgment having gone by default, damages were assessed and paid by the Sheriff. The Sheriff then brought an action against the defendant, alleging a false and wilful representation by the foreman of the defendant, whereby he was induced to detain T. W. in custody.—*Held*, there was no evidence to connect the defendant with the representation of his foreman, and that such representation was not false or wilful, inasmuch as it was made in answer to the Sheriff's inquiries, and when made, was believed to be true. Q. B. *Kinahan v. Malyn* 565
17. On an ejectment on the title, against an overholding tenant, it appeared in evidence that a lease had been made for three lives and thirty-one years, to be computed from the death of the surviving *cestui que vie*. The survivor was last heard of in 1814, and a notice to quit was served in October 1852.—*Held*, the presumption of the death was a question for the jury, and not a subject of direction. Q. B. *Nesbitt v. M'Manus* 600
18. Where a party is sued on a contract made in a foreign country, the Court will presume it is a legal contract according to the law of that country, unless the contrary be proved; and the onus of such proof lies upon the party objecting to its legality. Q. B. *Russell v. Kitchen* 613

## EXCEPTIONS.

See BILL OF EXCEPTIONS.

## EXECUTION.

See CAPIAS AD SATISFACIENDUM.  
PLEADING, 1, 2, 3.  
SHERIFF.  
SUGGESTION.

## EXECUTORS.

### EXECUTORS.

See CHARGING ORDER.

CLERGY.

LANDLORD AND TENANT.

SUGGESTION.

Judgment may be entered in the name of one executor against the other, on a warrant authorising a judgment against both. *Q. B. Hickey v. Musgrave* 446

FELONY.

See CRIMINAL LAW.

### FIAT.

It is the duty of the plaintiff, applying for a Judge's fiat, to set forth, in his affidavit to hold to bail, all the facts of the case in the first instance; and he is not justified in withholding facts from the knowledge of the Judge, on the supposition that they are not material to the case. *C. P. Rodocanachi v. Soderholm* 531

FIERI FACIAS.

See SHERIFF.

SUGGESTION OF BREACHES.

### FINE AND RECOVERY.

In Hilary 1806, A being, under a settlement made in 1769, tenant for life of thirteen denominations of land, with remainder to B in tail male, remainder to N. in tail male, A and B joined in a recovery; and by deed of the 9th of March 1806, executed by A, B and R., it was declared that the recovery was to be to the use of B and his heirs, but that he was forthwith to execute to R. a mortgage in fee of some of the lands in the recovery, to secure a debt due from A to R.; and by deed of mortgage of the same date, A and B conveyed (by lease and release) seven of the thirteen denominations to R. in fee, subject to redemption, &c. B died in January 1809, without issue, leaving N. (the next remainderman under the settlement of 1769) his heir-at-law. A died in 1816. N., having been in possession from the death of A in 1816, died in 1848, leaving the lessor

## FINE, &c.

681

of the plaintiff his eldest son, who claimed all the lands as heir in tail under the remainder to N. in the settlement of 1769. In 1810, N., by settlement on his marriage, after reciting (as if the recovery of 1806 had been in fact duly suffered) the declaration made by the first deed of the 9th of March 1806, of the uses of the recovery thereby recited to have been duly suffered, and without any further recital relating to the title, conveyed (by lease and release) all the lands comprised in the deed, declaring the uses of the recovery, including those in the mortgage, to R., to the use of himself for life, remainder to his first and other sons in tail male. N. never levied a fine or suffered a recovery. The recovery of 1806 had, down to the passing of the Act for the Abolition of Fines and Recoveries (4 & 5 W. 4, c. 92) been invalid as to some of the denominations in the mortgage to R., because though named in the deed making the tenant to the præcipe, they were not named in the recovery itself; and as to others of the mortgaged denominations, because the tenant to the præcipe was not made by C., in whom the legal freehold was outstanding, under a deed of 1799, whereby A's life estate in such of the lands as were comprised in that deed was assigned to C. and his heirs, in trust, to make certain annual and other payments out of the rents, and to pay any surplus to A. —*Held*, reversing the judgment of the Court of Queen's Bench, that at the time of the passing of the Act (August 1834), N. was in possession of the lands "*in respect of an estate which the recovery, if valid, would have barred*," within the meaning of those words in the 9th section of the Act; and that therefore the above defects in the recovery were not cured by the 5th and 6th sections; and the lessor of the plaintiff was entitled to recover the lands in the mortgage to R.—[*Dissentientibus*, PIGOT, C. B., PENNEFATHER, B.,

and MOORE, J.]—Ex. Ch. *Davies*  
v. *Darcy* 617

## FIXTURES.

*See* LANDLORD AND TENANT.

## FOREIGN LAW.

*See* EVIDENCE.

Where a party is sued on a contract made in a foreign country, the Court will presume it is a legal contract according to the law of that country, unless the contrary be proved; and the onus of such proof lies upon the party objecting to its legality. *Q. B. Russell v. Kitchen* 613

## FORGERY.

*See* EVIDENCE.

STOCK.

## FRANCHISE.

*See* REGISTRY APPEAL.

## FRAUDS, STATUTE OF.

*See* AGREEMENT.

## GENERAL ISSUE.

*See* PLEADING.

## GENERAL ORDERS.

*See* PLEADING.

SETTING ASIDE PROCEEDINGS.

## GLEBE.

*See* CLERGY.

## HABERE.

*See* EJECTMENT.

## INCUMBERED ESTATES.

*See* CHARGING ORDER.

JURY.

PROCEDURE ACT.

1. A, being seised of lands in fee-simple, executed a deed of settlement, by which he became tenant for life, with power to charge four years' income on the property, remainder to his first and other sons in tail male. He afterwards executed two mortgages—one to B,

## INCUMBERED, &amp;c.

and another to C. The latter filed a bill in the Court of Chancery for a foreclosure and sale, and impeached the deed of settlement as voluntary. The deed was declared voluntary as against the creditors of A. C became insolvent, and his assignee filed a petition in the Incumbered Estates Court for a sale of a portion of the lands in fee-simple. Pending the proceedings in the Incumbered Estates Court, a petition for re-hearing of the former decree was presented on behalf of the first tenant in tail. Several applications were made to the Commissioners to postpone the sale until after the re-hearing, but they declined to do so; and, pending those proceedings, sold a portion of the estate to the defendant in fee-simple. Previous to the execution of the mortgage to C, A had confessed judgments, which, together with the mortgage to B, amounted to a sum greater than four times the annual value of the property; but it did not appear in evidence what was due on those judgments. The Court of Chancery, after the sale, reversed the former decree, so far as it declared the deed of settlement voluntary. *Held*, that on this state of facts, the Commissioners of the Incumbered Estates Court had jurisdiction to ascertain and adjudicate as to incumbrances; and that, having done so in the present case, their decision was conclusive, as to there being an incumbrance sufficient to give them jurisdiction to sell, and the defendant's title, under their conveyance, indefeasible. *E. Rutledge v. Hood* 447

2. *Quære*.—Whether a conveyance from the Commissioners is conclusive as to their jurisdiction, and the accuracy of their proceedings? *Ibid*

3. An estate was sold in the Incumbered Estates Court, and the statute 12 and 13 *Vic.*, c. 77, declares that the purchaser of such sold estate shall hold the same discharged "from all rights, titles, charges and incumbrances whatsoever," &c. At the time of the sale,

## INDEMNITY.

there were arrears of poor-rate due out of some of the denominations sold. *Held*, that the purchaser was liable for such arrears, and that the lands might be distrained on for same; the poor-rate not being a charge within the terms of the section. *Q. B. Lally v. Concannon* 557

## INDEMNITY.

The plaintiff, as assignee of a bankrupt, consigned goods to the defendants, a Railway Company, to be forwarded to D., which the agent of the Company undertook to do on the following day; but in the meantime being apprised of an adverse claim to the goods by a third party, refused to do so, unless the plaintiff would furnish them with an indemnity. The plaintiff, having agreed to this, furnished the defendants with a letter, by which he agreed to indemnify them from the consequences of forwarding the goods to D., and that they should be at liberty to detain the goods until satisfied of the plaintiff's title.—*Held*, in an action of trover, brought against the defendants to recover the goods, that the second agreement was binding on the plaintiff, it being competent for the parties, before the breach of the first, without any new consideration, to have substituted another, and that the plaintiff was therefore bound to prove that he had, before bringing the action, satisfied the defendants as to his title to the goods. *C. P. Scott v. M. G. W. Railway Co.* 59

[S. C., Ex. Ch.] 573

## INDICTMENT.

*See* CRIMINAL LAW.  
EVIDENCE.

## INDORSEMENT.

*See* SETTING ASIDE PROCEEDINGS.

## INFANT.

The name of the next friend of an infant plaintiff need not be stated in

## IRREGULARITY. 683

the writ of summons and plaint before service. It is sufficient if it be inserted before the filing of the writ. *C. P. Grady v. Hunt* 522

## INQUISITION.

*See* CORONER.

## INSOLVENT COURT.

A, being a prisoner in the Four Courts Marshalsea, in execution under a *ca. sa.*, the Insolvent Court made an order on a creditor's petition, that A should file a schedule, pursuant to the 3 & 4 *Vic.*, c. 107. A, having disobeyed this order, the Insolvent Court issued a warrant of committal to the Richmond Bridewell for contempt.—*Held*, that the 3 & 4 *Vic.*, c. 107, only authorised a committal to the Four Courts Marshalsea or Kilmainham, for contempt committed by a person in the county or city of Dublin, and that the custody of A, in Richmond Bridewell, was illegal. *Q. B. In re Dickson* 101

## INSPECTION OF DOCUMENTS.

*See* AFFIDAVIT, 2.  
EVIDENCE.

An inspection of a document will not be granted to a plaintiff, on the plea that it contains a particular clause in support of his case, when the existence of such clause is directly denied by the defendant. *Cham. Frewen v. Incorporated Society* 118

## INSURANCE.

*See* POLICY OF INSURANCE.

## INTERPLEADER.

*See* SHERIFF.

## I O U.

*See* AGREEMENT.

## IRREGULARITY.

*See* SETTING ASIDE PROCEEDINGS.

An error in the description of a party in a writ of summons, and copy served,



which is not calculated to mislead, is a mere technical one, and as such can be amended under the 3rd section of the Process and Practice Act. Being only an irregularity, and not rendering the writ a nullity, it will be waived by the delay of the defendant, and by suffering the plaintiff to take a step in the cause. *E. Stephens v. O'Beirne* 66

## ISSUES.

*See* PLEADING.

## JUDGE.

*See* JURISDICTION.

## JUDGMENT.

*See* AMENDMENT.

EJECTMENT.

PLEADING.

REVIVOR.

SCIRE FACIAS.

SUGGESTION.

1. An attorney, being the assignee of a bankrupt, cannot enter satisfaction on the judgment without a warrant of attorney. *Q. B. Hodder v. Kift* 22
2. Where a judgment had been paid by the representative of the conusor to three out of four trustees, in whom it was vested, the fourth being resident out of the country, the Court refused to permit satisfaction of the judgment to be entered under the 143rd section of the 16 & 17 Vic., c. 113 (the Common Law Procedure Act). *C. P. Kelly v. Blake* 110
3. Judgment may be entered in the name of one executor against the other, on a warrant authorising a judgment against both. *Q. B. Hickey v. Musgrave* 446
4. The Court, on motion, allowed the erroneous re-docketing of a judgment of 1837 to be amended, in order that it might retain its priority over a subsequent judgment of 1840, properly re-docketed, to which it would otherwise have been postponed, through the operation of a mortgage of 1847. But it distinctly appeared

on affidavit, and by a schedule of incumbrances, filed in the Incumbered Estates Court, that the interest of the mortgagee of 1847 was not prejudiced by the amendment, inasmuch as the proceeds of the debtor's estate, from intervening incumbrances, fell short of reaching his claim in any case. *E. Wilcox v. Lowe* 470

## JURISDICTION.

*See* ATTORNEY.

COMMISSIONERS OF DRAINAGE.

INCUMBERED ESTATES.

INSOLVENT.

SERVICE OF PROCESS.

QUARTER SESSIONS.

1. After the plaintiff's case has been stated to the jury, and a fatality arises owing to the absence of a witness, the Judge has no jurisdiction to allow the plaintiff to withdraw the record; the plaintiff must submit to be nonsuited.—(*CRAMPTON, J., dubitante*). *Q. B. Swift v. Swift* 218
2. A Judge has jurisdiction under the Common Law Procedure Act to settle issues on circuit. *Q. B. Murphy Toohey* 226
3. The Full Court will review the decision of a Judge in chamber, in all cases, except where an exclusive jurisdiction is given to the Judge in chamber. *C. P. Grady v. Hunt* 522

## JURY.

*See* EJECTMENT.

NONSUIT.

SPECIAL JURY.

On the trial of an indictment for a libel, the jury, at the close of the first day's proceedings, separated without any order to that effect, or without the assent of plaintiff or defendant thereto being required, and assembled next morning, when the defendant's Counsel objected, in consequence of such separation, that the trial ought not to be proceeded with, but the Judge ruled against the objection, and ordered the trial to be proceeded

with. *Held*, that this did not amount to a mis-trial. Q.B. *Regina v. Wallace* 38

JUSTICE OF THE PEACE.

1. A magistrate, attending Petty Sessions in the discharge of his duty, is privileged from arrest. C.P. *Clen-dining v. Browne* 115
2. A *certiorari* lies to remove an order made by a Justice of the Peace under the Petty Sessions Act, when the order was made without jurisdiction. Q.B. *Regina v. Campbell* 586
3. All orders made under this Act should be signed by the Justice, and should show, on the face of them, that he had jurisdiction to make the order. *Ibid*
4. In showing cause against an order *nisi* for a *certiorari*, it is no objection to the affidavit on which it was obtained, that it is not entitled in the cause. The affidavit, although sworn by a marksman, is not objectionable, because of the omission in the jurat by the officer, that the deponent understood what was sworn to. Q. B. *Regina v. O'Brennan* 589
5. The conditional order was properly drawn up, by naming the prosecutor in the Court below the defendant in the order. *Ibid*
6. A writ of *certiorari* will be granted to return a charge, information and recognizance, on the application of a person arrested and bound over to keep the peace, on an information sworn before a police magistrate, though the applicant be not in actual custody, and not before the Court under a writ of *habeas corpus*. The writ will be granted, even though it lead to ulterior proceedings against the Justice whose conduct is the subject matter of inquiry. *Ibid*

LACHES.

See SETTING ASIDE PROCEEDINGS.

LANDLORD AND TENANT.

1. A leasee for lives renewable, after

the death of the last of the three *cestui que vies*, and before any renewal was obtained, made a lease of the premises to B. A afterwards took a renewal, which was granted in consideration of all rent due out of the premises. *Held*, that at the time of making the lease to B, A was tenant at will to the owner. Q.B. *Church v. Dalton* 4

2. A had, under the will of her husband, acquired the estate of which the renewal was obtained; by which will, after bequests of several legacies and annuities, which were not payable until a year after A's death, the testator appointed her sole executrix, and gave her power and control over all his real and personal estate, to raise money by mortgage or letting, if necessary, for protection of his estate; and also empowered her, by deed or will, to appoint one or more person or persons to carry out the trusts of his will. A obtained a renewal of the premises in June 1835; and in 1841 she made her will, and appointed the plaintiffs executors and executrix of her will, and also her residuary legatees, and nominated and appointed them trustees to carry out the intention of the will of her late husband. *Held*, that under A's will the reversion of the said premises passed to the plaintiffs. *Ibid*
3. A tenant, while in possession under his lease, set up for agricultural purposes a threshing-machine and steam-boiler. The threshing-machine was fastened to four bolts, fixed in the ground, but was capable of being detached from them by unscrewing four nuts at the end of the bolts, and removing the shaft of the machine, which passed through the wall of the house, both of which could be done without injury to the freehold. The steam-boiler was set in brick-work, which rested on the floor in the corner of the out-house, and touched both walls, but was capable of being removed by detaching the upper tier of the brick-

work, without injury to itself or the out-house. *Held*, that the threshing-machine and steam-boiler were not fixtures as between landlord and tenant, and that the tenant was entitled to them as removeable chattels. Cir. Cas. *Shinner v. Harman* 243

4. A *feri facias*, having issued against the goods and chattels of A, was lodged with the Sheriff (the defendant), on the 27th of October, and on the 28th the Sheriff seized. On the 29th, two notices were served on the defendant by creditors of A., cautioning him against seizing or selling said goods, except on behalf of assignees, to be thereafter appointed in the Court of Bankruptcy. The sale proceeded, and during its progress the landlord (plaintiff) claimed a year's rent as due out of the premises occupied by A. The goods were sold, and on the 5th of November a commission of bankruptcy issued, and on the 24th of November an assignee was appointed, who required the defendant to pay him the proceeds of the sale. The Sheriff applied for an interpleader order, and pursuant to its terms he lodged in Court the sum levied. An issue being directed by the Court, between the execution creditor and assignee, the result was that the title of the assignee was established: the landlord (plaintiff) thereupon applied to the Court to direct the money to be paid to him; but this application was refused, and the money was drawn out of Court by the assignee. *Held*, that the Sheriff was liable to an action under the statute of *Anne*, by the landlord, for not paying one year's rent. Q. B. *Gill v. Wilson* 544

5. *Held also*, that a claim by an assignee of a bankrupt does not displace the landlord's right to distress. *Ibid*

6. *Held also*, that the goods were not the property of the assignee, because no commission of bankruptcy had issued at the time of the sale. *Ibid*

7. *Held also*, that the application made

## MANDAMUS.

to the Court to draw out the money did not affect the plaintiff's right of action. *Ibid*

## LIBEL.

*See CRIMINAL LAW.*  
EVIDENCE.

## LIMITATIONS (STATUTE OF).

A lease for years was made by plaintiff and B to three lessees, who were dead at the time of the ejectment being brought. The defendant was in possession of the premises, and derived under the lessee who last died. No payment of rent was proved, nor was there any evidence to connect the defendant with the lease. A nonsuit being called for on the part of the defendant, on the ground that the plaintiff's right of entry was barred by 3 & 4 W. 4. c. 27, the Judge nonsuited, and the jury having been discharged without ascertaining the rent due:—*Held*, that the nonsuit was wrong, because a right of entry accrued with every successive gale of rent. Q. B. *Spratt v. Sherlock* 69

## LODGMET OF MONEY.

*See CHARGING ORDER.*  
MONEY.

## MAGISTRATE.

*See JUSTICE OF THE PEACE.*

## MALICE.

*See CRIMINAL LAW.*  
EVIDENCE.

## MANDAMUS.

1. Under the 1 & 2 Vic., c. 56, s. 48, the Poor-law Commissioners are to take order for the performance of religious service in the Workhouse, and to appoint a fit person to be chaplain, to hold office during pleasure, provided that in such appointment preference shall be given to some clergyman of the Established Church, officiating within the parish where the Workhouse is situate, if duly qualified.—*Held*, on a return to a mandamus requiring the Commis-

## MANDAMUS.

sioners to appoint the curate of the parish to the office (the rector having waived his right), that the Commissioners are the sole judges of the fitness for such office, and that a return, setting out that in their discretion and judgment they had appointed a duly qualified person, could not be questioned. *Q. B. Regina v. Poor-law Commissioners* 147

2. *Held also*, that the words, "preference shall be given to some clergyman of the Established Church, officiating within the parish," do not amount to an exclusion of all other clergymen; and that the other words, "if duly qualified," refer to something of which the Commissioners are to judge; "officiating" meaning doing the duty of an office. *Ibid*

3. *Held also*, that mandamus was the proper remedy, because the title of the prosecutor is asserted upon a supposal that the title of the party in possession is colorable or void; *quo warranto* does not lie for an office held during pleasure. *Ibid*

4. *Semble*.—In applying for the conditional order, the party benefited was the party in whose name the cause should be entitled. *Ibid*

## MEMBER OF PARLIAMENT.

*See* SERVICE OF PROCESS.

## MERITS.

*See* AFFIDAVIT OF MERITS.

## MILL OWNER.

*See* COMMISSIONERS OF DRAINAGE.

## MISDIRECTION.

*See* BILL OF EXCEPTIONS.  
EVIDENCE.

## MIS-TRIAL.

*See* CRIMINAL LAW.  
JURY.

## MONEY.

*See* CHARGING ORDER.  
LODGMENT OF MONEY.

## MONEY HAD AND RECEIVED.

*See* PLEADING, 4.  
SHERIFF.

## PETTY SESSIONS. 687

## MORTGAGE.

*See* FINE AND RECOVERY.  
INCUMBERED ESTATES.

## MOTION.

*See* AFFIDAVIT, 3.  
AMENDMENT.  
JURISDICTION.

When affidavits are filed as cause against a conditional order, a motion to show cause is irregular. *Q. B. O'Donnell v. O'Donnell* 29

## NEGLIGENCE.

*See* EVIDENCE.  
STOCK.

## NISI PRIUS.

*See* JUDGE.  
NONSUIT.

## NONSUIT.

*See* EJECTMENT.  
EVIDENCE.

After the plaintiff's case has been stated to the jury, and a fatality arises owing to the absence of a witness, the Judge has no jurisdiction to allow the plaintiff to withdraw the record; the plaintiff must submit to be non-suited.—(CHAMPTON, J., *dubitante*).  
*Q. B. Swift v. Swift* 218

## NOTICE.

*See* REGISTRY APPEAL.  
SUGGESTION.

## NOTICE TO QUIT.

*See* EVIDENCE.

## NOTICE OF TRIAL.

Sundays are not to be reckoned in notices of trial or notices of inquiry. The ten days' notice of trial must therefore be counted exclusive of Sunday. *Q. B. Kennan v. Garde* 20

## ORDER.

*See* CHARGING ORDER.

## PARLIAMENT.

*See* MEMBER OF PARLIAMENT.

## PERJURY.

*See* CRIMINAL LAW.

## PETTY SESSIONS.

*See* JUSTICE OF THE PEACE.

## PLAINT.

## PLAINT.

*See* SUMMONS AND PLAINT.

## PLEA IN ABATEMENT.

*See* JURY.

An indictment for libel having been found by the Term Grand Jury, in the Court of Queen's Bench, the traverser pleaded in abatement that two of the grand jurors were, at the time of their being summoned and serving on the jury, beyond the age of sixty years, and that another juror was not resident in the county of the city of Dublin. *Held*, that the Jury Act, 3 & 4 W. 4, c. 91, does not apply to Term Grand Juries in the Queen's Bench, and that therefore such pleas were bad. Q. B. *Regina v. Duffy* 88

## PLEADING.

*See* COMMISSIONERS OF DRAINAGE.

EJECTMENT.

INFANT.

IRREGULARITY.

SCIRE FACIAS.

SETTING ASIDE PROCEEDINGS.

SHERIFF.

(*Under the old practice*).

1. To a *scire facias* on a judgment, praying execution generally, the defendant pleaded that a *ca. sa.* had been issued by the plaintiff on foot of the judgment in the *sci. fa.* mentioned, under which the defendant had been arrested; and then averred that the defendant was released and discharged from this arrest by consent of the plaintiff, and from the execution upon said judgment. *Held*, that such a plea was bad on general demurrer. Q. B. *Burns v. O'Leary* 1
2. *Held also*, that, admitting the facts stated in the plea to be true, the *sci. fa.* need not pray a special execution excluding personal arrest. *Ibid*
3. *Semble*.—The voluntary discharge of a debtor, in custody under a *ca. sa.* issued on foot of a judgment, does

## PLEADING.

not deprive the creditor of his right to issue another execution under the statute 35 G. 3, c. 30. *Ibid*

4. A ship having been stranded on a bank near D., A, as receiver of droits, and also acting as Lloyds' agent, assisted in getting the vessel off the bank, and employed tug-boats and men for that purpose: to enable the vessel to be moved, a portion of her cargo was placed on board a tug-boat, and conveyed to D. On the arrival of the goods at D., A detained them under a claim for salvage, and also until he was paid fees claimed by him as receiver of droits, for the time the goods were in his custody, which fees B, as agent for the shippers, paid under protest. *Held*, that an action was maintainable by B, to recover back the money so paid, he having been dealt with by A as principal, and having paid the money out of his own pocket. Q. B. *Coatesworth v. Walsh* 93

5. *Held also*, that as receiver of droits, A was not entitled to the fees claimed, such fees being only payable to him for his services while employed in saving the vessel, and could only be claimed as against the owners of the vessel, and that he had no lien on the goods for them. *Ibid*
6. *Held also*, that A was entitled to set-off for his services and expenses incurred by him as a salvagor, under the statute 9 & 10 Vic., c. 99. *Ibid*
7. A *sci. fa.*, issued by the assignee of a judgment, directed the Sheriff to make known as well "to the heirs of the conusor of the said judgment, as also to the several tenants to the lands and tenements which were of the said conusor, &c., to show if they have or know any thing to say for themselves, wherefore the debt and damages aforesaid ought not to be made, &c., according to the said recovery." The Sheriff returned that he had "made known to the within-named A, B and C, heiress-at-law of the said conusor,

and also to D and E, tenants to the lands and premises within mentioned." *Held*, that though the words, "the lands," in the *sci. fa.* meant "all the lands," they had not that signification necessarily in the return, and that it was therefore bad on special demurrer, for ambiguity. E. *Fottrell v. Griffith* 131

8. *Held also*, it is sufficient in a *sci. fa.* at suit of assignee of a judgment, to pray judgment "according to the said recovery," without the addition of the words, "and assignment." *Ibid*

9. *Quere*—Necessary to specify the lands by name, in the return? *Ibid*

10. A declaration set out a submission, whereby the defendants undertook to abide by whatever award the arbitrators or the majority of them might publish, but it contained no averment that the defendants (who were a corporation) had contracted under their common seal to perform the award. *Held*, that such would be intended, and that it was not necessary specially to aver that the submission was by deed. Q. B. *McClintock v. Londonderry and Coleraine Railway Company* 609

*Pleading under Common Law Procedure Act.*

11. Where an action had been commenced prior to the passing of the Common Law Procedure Act, it may be continued under the law then in force. Q. B. *McCay v. Magill* 83

*Summons and Plaintiff.*

12. A plaintiff omitting the indorsement required by the 17th General Order, is irregular, and such irregularity may be taken advantage of after filing of the plaintiff; the filing of the plaintiff not amounting to a step taken after knowledge of the irregularity. Q. B. *Powell v. Price* 232

13. Where a summons and plaintiff was served on the 9th of May, and the defendant on the 23rd day of the same month served a notice of motion to set it aside for irregularity, as not

containing a sufficient description of the plaintiff's residence, the Court *Held*, that the application was too late. C. P. *Roche v. Wilson* 252

14. A summons and plaintiff, not indorsed as required by the General Order, is liable to be set aside for irregularity. The filing of the summons and plaintiff is not a fresh step after knowledge of the irregularity, under the 179th General Order. C. P. *Fitzgerald v. Browne* 253

15. The Court will not set aside a writ of summons and plaintiff, if signed by Counsel, on the ground that it contains several counts varying the cause of action, where the plaintiff does not appear to have unnecessarily re-stated his complaint, with a view to oppress or embarrass the defendant. C. P. *Harrison v. Lynch* 527

*Defence and Subsequent Pleadings.*

16. A defence will be set aside when amounting to the general issue. Q. B. *Dowling v. Wallace* 83

17. To summons and plaintiff, for use and occupation, defendant pleaded that he is not indebted in the sum in the summons and plaintiff mentioned, for the use and occupation of the premises, as he heretofore discharged the same. *Held*, that such defence was bad, either as amounting to the general issue, or to a defence of payment; and if the latter, the time and manner of payment should have been indorsed or specified. Q. B. *Russell v. Nelson* 229

18. Where, to an action for goods sold and delivered, the defendant pleaded as to part that he was not indebted, &c., and as to the residue, accord and satisfaction:—*Held*, that the defence was irregular and embarrassing, the plea of *not indebted* being too general. Q. B. *Allard v. Ranagan* 233

19. A defence to a writ of summons and plaintiff, complaining of a breach of covenant for non-payment of rent, stating that defendant had agreed for a certain consideration to accept, and

had accepted, an abated rent, and that the sum demanded was a violation of the agreement; and further pleading that the only sum due was £60, which the defendant brought into Court:—*Held* bad, because it did not allege whether or not the agreement was under seal. Q. B. *Neville v. Hyland* 238

20. To a writ of summons and plaint for goods sold and delivered, goods bargained and sold, and an account stated, defendant pleaded that he "is not and never was indebted to the plaintiff, in respect of the several causes of action, or any of them, in the summons and plaint mentioned."—*Held*, that such defence was no traverse of any one fact in the summons and plaint mentioned, and was too wide. Q. B. *Cock v. Mahony* 240

21. In an action against a Railway Company, for injuries done to the plaintiff's house, the defendants pleaded that the alleged injuries were committed under the provisions of a certain Act of Parliament, and the plaintiff should have pursued the remedy given by that Act. The plaintiff having applied under the Common Law Procedure Act (16 & 17 Vic., c. 113), to have the plea set aside as embarrassing, the Court refused the application, and said that the plaintiff's course was to demur to the plea. C. P. *Connolly v. Dublin and Drogheda Railway Co.* 255

22. Where to a plaint in an action for malicious prosecution, averring that the defendant, maliciously and without probable cause, caused the plaintiff to be falsely indicted for, &c., "and the defendant did prosecute, and caused the said indictment to be prosecuted," &c., the defendant, dividing the plaint into two parts, traversed the statement that he maliciously caused the indictment to be preferred, and demurred to that part of the plaint which averred that he prosecuted the indictment, &c., for the omission of an allegation that he had done so

"maliciously," &c. The Court, holding that the plaint disclosed but a single cause of action, and that the mode of defence was calculated to embarrass the plaintiff, set aside the demurrer with costs, giving the defendant leave to plead to the whole plaint. E. *Boyle v. Hammond* 579

23. To a plaint, containing a count for money paid for the support of the defendant's illegitimate child, at his request, and the common money counts, the defendant, along with pleas traversing the various allegations in the plaint, and a plea of the Statute of Limitations, pleaded, "that he was not indebted, &c., in the sum of £30, or any other sum, &c., on account of the several, or any, &c., of the alleged causes of action mentioned in said plaint." This plea was struck out on motion. E. *Dalziel v. Walker* 581

24. To a plaint, upon a banker's cheque, the defendant, among other pleas, pleaded fraud and covin, and a plea of misrepresentation generally, without setting out the facts of either. On a motion to strike out those pleas, as framed to embarrass, or that the defendant should set out the particular facts of each:—*Held*, in the absence of an allegation in the plaintiff's affidavit, that he was ignorant of the circumstances constituting the alleged fraud, that such plea may be pleaded generally; but that the facts constituting the misrepresentation should be set out, either in the body of the plea or in the particulars. E. *Reddick v. Cavanagh* 582

25. Leave will not be given, under section 57, Common Law Procedure Act, to file several inconsistent pleas. E. ——— v. *M'Donough* 584

26. A plea amounting to the general issue will be set aside, and leave to mark judgment granted, in the absence of an affidavit of merits by the defendant. E. *Smith v. Grant* 585

## PLEADING.

27. The Court, in granting liberty to rejoin, will not confine the rejoinder to any particular matter, but will make the order that defendant be at liberty to rejoin generally. Q. B. *Huston v. Wallace* 225
28. Practice as to settlement of issues. Q. B. *Cantwell v. Cannock* 78
29. Where a summons had been served to settle issues before a Judge on circuit, and the defendant did not attend on the settlement of the same, and the plaintiff proceeded to trial (the defendant not appearing) and obtained a verdict:—*Held*, on motion by way of appeal to set aside the issues and the proceedings founded thereon, on the ground of irregularity, that the summons was regular, and the trial properly had. Q. B. *Murphy v. Toohey* 226
30. To a plaint, stating that the defendants held certain premises under a lease, as tenants to the plaintiff, at a yearly rent, to which the defendants pleaded that they did not or do not hold the premises as in plaint mentioned, as tenants to the plaintiff, under a lease *modo et forma*; the issues tendered by the plaintiff were first, whether the plaintiff was entitled to the possession of the premises on the day stated; secondly, what was the amount of rent due by the plaintiff?
- Held*, that these were proper issues *Ibid*
31. *Held*, per CRAMPTON, J., such defence was bad, and would have been set aside on motion. *Ibid*

## POLICY OF INSURANCE.

### See JURY.

F. proposed his life for insurance, and signed a form of proposal which contained his answers to twenty-seven questions, the twenty-first and twenty-second of which were as follow:—"21.—Did any of the party's near relations die of consumption or any other pulmonary complaint?—Answer, No."—"22. Has the party's life been accepted or refused at any office? &c.—Answer, No." The pro-

## POLICY, &c.

691

posal also contained the following agreement:—"I hereby agree, that the particulars mentioned in the above proposal shall form the basis of the contract between the assured and the Company; and if there be any fraudulent concealment, or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said Company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void." The policy contained a warranty on the part of F., as to most of the facts, replied to in the proposal, but not as to questions twenty-one and twenty-two. It then provided that the policy should be null and void, and all moneys paid by F. forfeited, upon F. dying, in certain enumerated modes; "or if any thing so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said Company, or if any fraud shall have been practised upon the said Company, or any false statement made to them in or about the obtaining or effecting of this insurance." Upon an action on the policy against the Company, it appeared that the answers to questions twenty-one and twenty-two were not true.—*Held*, reversing the decisions of the Courts of Exchequer and Exchequer Chamber in Ireland, that the Judge was wrong in directing the jury, that if they found the statements both *false and material*, they should find a verdict for the defendants; and that the questions which the Judge ought to have left to the jury were, first, were the statements false; and secondly, were they made in obtaining or effecting the policy? H. L. *Anderson v. Fitzgerald* 475



Observations on the form of this policy and its ambiguity, and the effect of making *some* of the statements in the proposal matters of warranty—*per* Lord St. Leonards. H. L. *Anderson v. Fitzgerald* 475

A bill of exceptions should state what directions the Judge gave on the particular issue raised, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. *Ibid*

#### POOR-LAWS.

*See* REGISTRY APPEALS.

##### SERVICE OF PROCESS.

1. Two Poor-law rates were made on certain premises on the 21st of December 1847, and 21st of December 1848; the rated premises were under £4 per annum value, and one M. was rated as immediate lessor, but no person was named as occupier in the rate book. When the rates were made, A held the premises under a lease from M., made before 6 & 7 Vic., c. 92, he being then the immediate lessor; but before the levy of the rate, A had ceased to occupy the premises, and the plaintiff in 1850 became the occupier as yearly tenant to M. The rates not being paid by M. within four months after the making of them, the plaintiff was required to pay them as occupier, and he having refused, the premises were distrained.—*Held*, such distress was legal, because the person liable to the rate cannot set up an error in the rate book as a defence to a distress for the rate, the rate being a valid rate. Q. B. *Rush v. Guardians of Roscommon Union* 14

2. *Semle*.—The proper course would have been an appeal against the rate. *Ibid*

3. Under 1 & 2 Vic., c. 55, s. 48, the Poor-law Commissioners are to take order for the performance of religious service in the Workhouse, and to appoint a fit person to be chaplain, to hold office during pleasure, provided that in such appointment preference shall be given to some clergyman of

#### POOR-LAWS.

the Established Church, officiating within the parish where the Workhouse is situate, if duly qualified.—

*Held*, on a return to a mandamus requiring the Commissioners to appoint the curate of the parish to the office (the rector having waived his right), that the Commissioners are the sole judges of the fitness for such office, and that a return, setting out that in their discretion and judgment they had appointed a duly qualified person, could not be questioned. Q. B. *Regina v. Poor-law Commissioners* 147

4. *Held also*, that the words, "preference shall be given to some clergyman of the Established Church, officiating within the parish," do not amount to an exclusion of all other clergymen; and that the other words, "if duly qualified," refer to something of which the Commissioners are to judge; "officiating" meaning doing the duty of an office. *Ibid*

5. *Held also*, that mandamus was the proper remedy, because the title of the prosecutor is asserted upon a supposal that the title of the party in possession is colorable or void; *quo warranto* does not lie for an office held during pleasure. *Ibid*

6. *Semle*.—In applying for the conditional order, the party benefited was the party in whose name the cause should be entitled. *Ibid*

7. Where a voting paper for the election of a Poor-law guardian was signed by a proxy, duly authorised, but which paper did not contain on the face of it the name of the person authorising the proxy to vote:—*Held*, that votes given by such voting paper were properly rejected, the paper not being in conformity with the election orders of the Poor-law Commissioners. Q. B. *Regina v. Austin* 441

8. *Held also*, the 6 & 7 Vic., c. 92, s. 23, having provided a special tribunal for the decision of such questions, this Court would not grant a *quo warranto*. *Ibid*

## POOR-LAWS.

An estate was sold in the Incumbered Estates Court, and the statute 12 & 13 Vic., c. 77, declares that the purchaser of such sold estate shall hold the same discharged "from all rights, titles, charges and incumbrances whatsoever," &c. At the time of the sale, there were arrears of poor-rate due out of some of the denominations sold. *Held*, that the purchaser was liable for such arrears, and that the lands might be distrained on for same; the poor-rate not being a charge within the terms of the section. Q. B. *Lally v. Concannon* 557

### POSTEA.

*See* AMENDMENT.

### POWER.

*See* WILL.

### PRACTICE.

*See* Respective Titles.

### PRESENTMENT.

*See* COMMISSIONERS OF DRAINAGE.

### PRINCIPAL AND AGENT.

*See* PLEADING.  
SALVAGE.

### PROCESS AND PRACTICE ACT.

*See* COSTS.  
JURY.

An error in the description of a party in a writ of summons, and copy served, which is not calculated to mislead, is a mere technical one, and as such can be amended under the 3rd section of the Process and Practice Act. Being only an irregularity, and not rendering the writ a nullity, it will be waived by the delay of the defendant, and by suffering the plaintiff to take a step in the cause. E. *Stephens v. O'Beirne* 66

### PROXY.

*See* POOR-LAWS.

### QUANTUM MERUIT.

*See* ATTORNEY.

## RECOGNIZANCE. 693

### QUARTER SESSIONS.

1. An indictment for perjury charged that a civil-bill came on to be tried in due form of law, and was tried by the Assistant-Barrister for the county, on which trial the prisoner (being defendant in the civil-bill) appeared, and was then and there duly sworn before the Assistant-Barrister, he having sufficient and competent authority to administer said oath. *Held*, that the indictment was sufficient; and that it was not necessary to aver that the civil-bill was for a cause of action within the jurisdiction of the Civil-bill Court. Cr. Ap. *Regina v. Lawlor* 507
2. *Held also* that the Court of Quarter Sessions had jurisdiction to try a case of perjury. *Ibid*
3. *Held also*, that the Barrister had jurisdiction to award the costs and expenses of such prosecution to the prosecutor. *Ibid*

### QUO WARRANTO.

*See* MANDAMUS.

1. Where a voting paper for the election of a Poor-law guardian was signed by a proxy, duly authorised, but which paper did not contain on the face of it the name of the person authorising the proxy to vote:—*Held*, that votes given by such voting paper were properly rejected, the paper not being in conformity with the election orders of the Poor-law Commissioners. Q. B. *Regina v. Austin* 441
2. *Held also*, the 6 & 7 Vic., c. 92, s. 23, having provided a special tribunal for the decision of such questions, this Court would not grant a *quo warranto*. *Ibid*

### RATES AND RATING.

*See* POOR-LAWS.

REGISTRY APPEALS.

### RECEIVER OF DROITS.

*See* SALVAGE.

### RECOGNIZANCE.

*See* ERROR.

## RECORD.

See ERROR.

## RECOVERY.

See FINE AND RECOVERY.

## REJOINDER.

See PLEADING.

## REGISTRY APPEALS.

1. By the 3rd section of 12 & 13 Vic., c. 85, it is enacted that every man of full age, in occupation of a house within the borough of D., shall, if duly enrolled, be a burgess, provided that no one is to be enrolled unless rated in respect of the occupied premises to poor-rates, and unless he shall have paid on or before the 31st of August in each year all the rates specified in the schedule to the Act, as shall have become payable by him in respect thereof, except such as shall become payable within six calendar months before said 31st of August; and by c. 91, the Collector-General of Taxes is directed to declare a poundage rate; and every such rate is to be collected, levied and paid by instalments, in case the Collector-General shall so think fit: and in case he shall determine that the rates shall be paid by instalments, he shall give notice to that effect; and from and after the publication of such notice, the rates shall be deemed due and payable. The Collector-General published a notice accordingly, declaring that the rate had been made, and declaring it payable by instalments on the 1st of January, 1st of July, and 1st of October. —*Held, per LEFROY, C. J., and CRAMPTON, J.,* that the entire of said rate should be paid on or before the 31st of August in each year, to entitle the rate-payer to be enrolled as a burgess. *Sed, per FERRIN, J., and MOORE, J.,* the payment of the first instalment was sufficient for that purpose. Q. B. *In re Brennan* 162
2. A notice of claim to be rated in respect of premises, qualifying as a

voter under 13 & 14 Vic., c. 69, sec. 110, is sufficient if signed with the name of the claimant, in the handwriting of another person, by the authority of the claimant. Ex. Ch. *M'Niffe ap. M'Tiernan resp.* 186

3. A yearly tenant of rated premises let the shop and adjoining parlour, part of the premises, to a stranger, at a rent; a door opened from the shop into the street, through which the occupier had ingress and egress, and had exclusive control over it; a hall-door opened into the same street, and a passage led from it through the house to back premises; a door opened from the parlour adjoining the shop into this passage; the yearly tenant occupied the upper stories of the house, and his mode of ingress was through the hall-door.—*Held*, that the occupation of the upper stories was not an ownership or occupation of the entire of the rated premises, within the meaning of 13 & 14 Vic., c. 69, s. 5. Ex. Ch. *Brady ap. Ryan resp.* 187
4. On revision of the lists of persons claiming to be entitled to vote at elections, when no objection has been served on a claimant, and none made: *Held*, that the Assistant-Barrister has no jurisdiction to require the claimant to give evidence of his right to have his name inserted on the list. Ex. Ch. *Boon ap. Moffatt resp.* 190
5. *Held also*, a claim to be registered for a city or borough need not be signed by the claimant personally. *Ibid*
6. The Collector-General of Rates for the borough of Dublin declared the poundage rate payable and leviable in respect of the poor-rate, and signed the entries thereof in the rate book, pursuant to 12 & 13 Vic., c. 91, on the 1st of January 1853, but had on the 30th of December 1852 published notices of the poundage rate being payable by instalments, one of which instalments was payable on the 31st of December 1852. A claimant to

vote at Parliamentary elections for the borough had paid all his poor-rates on the 1st of July 1853, save those in this notice of the consolidated rate entered in the Collector-General's book; and at the revision of voters his name was objected to because of the non-payment of these rates. *Held*, that such rate was not one payable within 13 & 14 *Vic.*, c. 69, s. 5, before the 1st of January 1853, and that its non-payment did not disqualify the claimant. *Ex. Ch. Ryan ap. Bates resp.* 191

7. A claimant's name was placed and returned by the Town-clerk on list No. 7, as entitled to vote for the city of Dublin; an objection was in due time taken to his name being retained on this list, and notice thereof duly served. The claimant served notice on the Town-clerk of his claim to be put on list No. 12, and he was by him returned on that list as a £10 leaseholder. No objection to this claim was taken or served on him or on the Town-clerk. On the revision of list No. 7, it was proved that the claimant held an office which disqualified him from voting, and his name was expunged from that list; but when list No. 12 was revising, this general disqualification was suggested, and it was contended that as no notice of objection to his being on list No. 12 had been served, the Barrister had no jurisdiction to inquire into the case. *Held*, that when the Registry is correct on the face of it, the Barrister has no authority to inquire into the case (except in the case of death), unless an objection has been taken, and unless there be an objection attached to the claimant's name on the list as taken, and notice of it served; the attendance of the voter on production of any evidence is not to be required. *Ex. Ch. Collins ap. Moffatt resp.* 194

8. *Held also*, where a name is erroneously expunged from the list of voters, this Court will make an order to have it restored. *Ibid*

9. Under the provisions of the 13 & 14

*Vic.*, c. 69, certain lists of electors for boroughs are to be prepared according to forms numbered 7, 8 and 9 respectively in a schedule to the Act. Claimants omitted from these lists are to give notice to the Town-clerk of the borough, of claims to be inserted in whatever list the claimant may consider himself included, pursuant to the forms in the schedule; and persons objecting to names being on the list must serve notice of objection according to form No. 14 in the schedule. Two lists only were prepared by the Town-clerk of T.—one corresponding to list No. 7 in the schedule, the other to list No. 8. No list corresponding with No. 9 was prepared. A claimant sought to be admitted to be inserted in list "No. 3," and was objected to, though it was admitted he would have been entitled to be inserted in a list corresponding with No. 9 in the schedule. The Barrister held the notice of claim and of objection bad, for uncertainty. *Held* on appeal, that the notice was sufficiently certain, and even if inaccurate, it was cured by the 115th section of 13 & 14 *Vic.*, c. 69. *Ex. Ch. Murphy ap. Connor resp.* 203

10. *Held*, that the headings of forms in the schedules to the Act are no part of the Act. *Ibid*

11. Where sufficient appears on the case reserved by the Barrister to enable the Court to give judgment as to retaining a name on a list of claimants, this Court will not remit the case for amendment, but decide on the reservation, either by expunging or inserting the name. *Ibid*

REMITTER.

*See* FINE AND RECOVERY.

RENEWAL.

*See* LANDLORD AND TENANT, 1, 2.

RENT.

*See* LANDLORD AND TENANT.

REPLEVIN.

*See* POOR-LAW.

## RETAINER.

## RETAINER.

See ATTORNEY.

## RETURN.

See MANDAMUS.

SCIRE FACIAS.

SHERIFF.

## REVERSION.

See LANDLORD AND TENANT.

## REVIVOR.

See SUGGESTION.

1. New trustees of a marriage settlement, having been appointed by virtue of the Trustee Act, were by order of this Court made conusees of a judgment, part of the settled property, and as such were allowed to issue a writ of revivor to revive said judgment. Q. B. *Stopford v. Evans* 75
2. A conditional order will be granted to revive a judgment, when the time for payment has not arrived, the time being dependant on a life still in being. Q. B. *Fishbourne v. Freeman* 226

## SALVAGE.

1. A ship having been stranded on a bank near D., A, as receiver of droits, and also acting as Lloyds' agent, assisted in getting the vessel off the bank, and employed tug-boats and men for that purpose: to enable the vessel to be moved, a portion of her cargo was placed on board a tug-boat, and conveyed to D. On the arrival of the goods at D., A detained them under a claim for salvage, and also until he was paid fees claimed by him as receiver of droits, for the time the goods were in his custody, which fees, B, as agent for the shippers, paid under protest.—*Held*, that an action was maintainable by B, to recover back the money so paid, he having been dealt with by A as principal, and having paid the money out of his own pocket. Q. B. *Coatesworth v. Walsh* 93
2. *Held also*, that as receiver of droits, A

## SECURITY, &amp;c.

was not entitled to the fees claimed, such fees being only payable to him for his services while employed in saving the vessel, and could only be claimed as against the owners of the vessel, and that he had no lien on the goods for them. *Ibid*

3. *Held also*, that A was entitled to set-off for his services and expenses incurred by him as a salvagor, under the statute 9 & 10 Vic., c. 99. *Ibid*

## SATISFACTION OF JUDGMENT.

See JUDGMENT.

## SCIRE FACIAS.

See PLEADING, 1, 2, 3.

## SERVICE OF PROCESS.

A *sci. fa.*, issued by the assignee of a judgment, directed the Sheriff to make known as well "to the heirs of the conusor of the said judgment, as also to the several tenants to the lands and tenements which were of the said conusor, &c., to show if they have or know any thing to say for themselves wherefore the debt and damages aforesaid ought not to be made, &c., according to the said recovery." The Sheriff returned that he had "made known to the within-named A, B and C, heiresses-at-law of the said conusor, and also to D and E, tenants to the lands and premises within-mentioned." *Held*, that though the words, "the lands," in the *sci. fa.* meant "all the lands," they had not that signification necessarily in the return, and that it was therefore bad on special demurrer, for ambiguity. E. *Fottrell v. Griffith* 131

*Held also*, it is sufficient in a *sci. fa.* at suit of assignee of a judgment, to pray judgment "according to the said recovery," without the addition of the words, "and assignment." *Ibid*

*Quare*—Necessary to specify the lands by name, in the return? *Ibid*

## SECURITY FOR COSTS.

1. A plaintiff, resident out of the juris-

diction, filed his summons and plaint, and the defendant thereupon served a preliminary notice, calling on the plaintiff to give security for costs, which notice not being complied with, notice of a motion to the Court for that purpose was served upon the plaintiff, grounded upon an affidavit that the defendant had a just and legal defence upon the merits; and pending this notice, defendant filed his defence, notifying to the plaintiff that he did not thereby intend to waive his right to security for costs. *Held*, that the filing of this defence was no waiver of the defendant's right to security for costs, and that the affidavit of the defendant was sufficient for that purpose. Q. B. *Taylor v. Lowe* 223

2. An affidavit of merits, on belief that defendant had a good and legal defence on the merits—*Held*, sufficient to justify an order for security for costs; but an affidavit of merits, stating that the defendant had a just and valid defence at law upon the merits—*Held*, insufficient. Q. B. *Spencer v. Campion* 231

See also *Shaw v. Craig*. Q. B. note *Ibid*

3. On an application to compel the plaintiff to give security for costs, under the 52nd section of the Common Law Procedure Act (16 & 17 Vic., c. 113), it is sufficient if the defendant's affidavit states that he has a good defence on the merits. The affidavit need not state the nature of the defence. C. P. *Eyre v. Sparks* 542

#### SERVICE OF PROCESS.

See EJECTMENT.

1. Service of a *sci. fa.* substituted on a person who had acted as attorney for the conusor, and also on one who had acted as his agent, notice of the order being given to the creditors of the conusor, who were in possession of his property. Q. B. *Cartwright v. Ball* 31
2. The 31st section of the Common Law

Procedure Act applies to actions of ejectment, and the provisions of it are mandatory; and service of the plaint will not be held good, where the indorsement on the writ is not made within the time limited by that section. Q. B. *Vandeleur v. Smith* 86

3. *Quære*—The proper mode of serving the writ of summons and plaint in ejectment against the guardians of a Poor-law union, under the 16 & 17 Vic., c. 113? C. P. *White v. Adair* 109
4. The temporary absence of a defendant out of the jurisdiction, if, for example, attending Parliament, is not ground to justify a substitution of service. Q. B. *McDonough v. McCartney* 239
5. The Court has no power to substitute service on a defendant residing out of the jurisdiction of the Court, in a case in which the cause of action has arisen out of its jurisdiction. E. *Collins v. De Montmorency* 473

#### SET-OFF.

See COSTS.

PLEADING.

#### SETTLEMENT.

See FINE AND RECOVERY.

#### SETTING ASIDE PROCEEDINGS.

See PLEADING.

1. Sundays are not to be reckoned in notices of trial or notices of inquiry. The ten days' notice of trial must therefore be counted exclusive of Sunday. Q. B. *Kennan v. Garde* 20
2. The finding of a Coroner's jury can only be quashed for defects apparent on the face of the inquisition, or for the misconduct of the Coroner. An allegation, therefore, of the insufficiency of the evidence returned by the Coroner to support the finding, is not ground adequate to rest an application to set aside the inquisition. Q. B. *In re Casey* 22
3. To summons and plaint, for use and

occupation, defendant pleaded that he is not indebted in the sum in the summons and plaint mentioned, for the use and occupation of the premises, as he heretofore discharged the same.—*Held*, that such defence was bad, either as amounting to the general issue or to a defence of payment; and if the latter, the time and manner of payment should have been indorsed or specified, and should therefore be set aside; but as the action was brought for a small sum of money, the Court gave no costs of the motion. Q.B. *Russell v. Nelson* 229

4. A plaint omitting the indorsement required by the 7th General Order is irregular, and such irregularity may be taken advantage of after the filing of the plaint; the filing of the plaint not amounting to a step taken after knowledge of the irregularity, under the 179th General Order. Q.B. *Powell v. Price* 232

5. Where a summons and plaint was served on the 9th of May, and the defendant on the 23rd day of the same month served a notice of motion to set it aside for irregularity, as not containing a sufficient description of the plaintiff's residence, the Court *Held*, that the application was too late. C.P. *Roche v. Wilson* 252

6. A summons and plaint, not indorsed as required by the General Order, is liable to be set aside for irregularity. The filing of the summons and plaint is not a fresh step after knowledge of the irregularity, under the 179th General Order. C.P. *Fitzgerald v. Browne* 253

7. The Court will not set aside a writ of summons and plaint, if signed by Counsel, on the ground that it contains several counts varying the cause of action, where the plaintiff does not appear to have unnecessarily re-stated his complaint, with a view to oppress or embarrass the defendant. C.P. *Harrison v. Lynch* 527

## SHERIFF.

1. A and B, on the 30th of May, issued a *fi. fa.* against the goods of C, and there was delivered therewith a letter from A and B to the Sheriff, stating "that they did not wish to sell at present, unless he was forced by some other execution creditor, their object being to protect the property for the good of all the creditors of C, as the property would be forthcoming; they, placing reliance and confidence in C, did not wish any exposure at the present." On the 3rd of June they wrote a second letter, stating, "they supposed the Sheriff had taken possession under the execution ere that; if he had not, they directed him to do so, as they apprehended other executions would be sent in shortly, and directing the Sheriff to expose the defendant in execution as little as possible, as they had confidence in him; and that if a bailiff were sent, he should act as discreetly as possible." The Sheriff seized on the 5th of June, and on the following day an execution at the suit of E and F came in. The Sheriff sold on the 10th, and paid a portion of the proceeds to A and B, retaining the balance in his hands; and on the 15th of June, he made a return to the writs at the suit of E and F, stating, that he had no goods in his hands, save those seized under the prior execution. On the 6th of November, he made a return to the first writ, stating he had levied £211, out of which he paid £106 to A and B, and that he retained the balance in his hands in consequence of conflicting claims. On the 10th of November an application was made to the Court of Exchequer by A and B, requiring him to amend his return, and to pay over to them the balance in his hands. The Sheriff appeared on that motion, as also Counsel on behalf of E and F; and the Sheriff applied for an interpleader order. The Court refused to hear Counsel on behalf of E and F,

and directed the Sheriff to pay over the balance to A and B.

An action having been brought by E and F against the Sheriff, for money had and received, a special verdict was found, setting forth the above facts.—*Held*, affirming the judgment of the Court of Exchequer, that under the circumstances the Sheriff was responsible to the plaintiffs for money had and received to their use. Ex. Ch. *Kirwan v. Jennings* 48

2. *Held also*, that the order made by the Court of Exchequer was no answer to the plaintiffs' action, they not being parties to that order. *Ibid*

3. *Held also*, that the effect of the letters of 30th of May and 3rd of June was to suspend the execution of the writ by sale of the goods, until and unless another execution came in. *Ibid*

4. *Held also*, that the suspension order operated as a withdrawal of the execution; and the writ lodged subsequently, in point of time acquired priority in point of law over the first writ. *Ibid*

5. Where a Sheriff's return to a writ of *fi. fa.* is so informal as to be calculated to deprive the plaintiff of the fruits of his execution, or seriously embarrasses him in bringing an action against the Sheriff, the Court will, on motion, compel him to amend it. E. *Harris v. O'Meagher* 129

6. Prior to the Common Law Procedure Act, a defendant cannot be detained under a *ca. sa.* until the poundage fees and expenses of the execution were paid, if he tendered the sum marked on the writ. Ex. Ch. *Chadwick v. Atkinson* 425

7. Where a return is good on the face of it, the Court will not compel a Sheriff to amend the return, but will leave the complainant to his remedy by action, if the matters suggested on the affidavits be triable by that form of procedure. Q. B. *Cumming v. ———* 428

8. A *fi. fieri facias* having issued against the goods and chattels of A., was lodged with the Sheriff (the defendant), on the 27th of October, and on the 28th the Sheriff seized. On the 29th, two notices were served on defendant by creditors of A., cautioning him against seizing or selling said goods, except on behalf of assignees, to be thereafter appointed in the Court of Bankruptcy. The sale proceeded, and during its progress the landlord (plaintiff) claimed a year's rent as due out of the premises occupied by A. The goods were sold, and on the 5th of November a commission of bankruptcy issued, and on the 24th of November an assignee was appointed, who required the defendant to pay him the proceeds of the sale. The Sheriff applied for an interpleader order, and pursuant to its terms he lodged in Court the sum levied. An issue being directed by the Court, between the execution creditor and assignee, the result was that the title of the assignee was established; the landlord (plaintiff) thereupon applied to the Court to direct the money to be paid to him; but this application was refused, and the money was drawn out of Court by the assignee. *Held*, that the Sheriff was liable to an action under the statute of *Anne*, by the landlord, for not paying one year's rent. Q. B. *Gill v. Wilson* 544

9. *Held also*, that a claim by an assignee of a bankrupt does not displace the landlord's right to distress. *Ibid*

10. *Held also*, that the goods were not the property of the assignee, because no commission of bankruptcy had issued at the time of the sale. *Ibid*

11. *Held also*, that the application made to the Court to draw out the money did not affect the plaintiff's right of action. *Ibid*

12. A writ of *ca. sa.* was lodged with the Sheriff, who arrested T. W. instead of H. W., the real debtor.



Having him in custody, he took him to the establishment of the defendant (the plaintiff in the execution), who, being from home, his foreman, in answer to an inquiry from the Sheriff's bailiff, told him T. W. was the real defendant. Thereupon the Sheriff conveyed T. W. to the marshalsea; and afterwards, an application being made to discharge T. W. from custody, at the defendant's request, the motion for the discharge of T. W. was deferred until the following day, when defendant, having discovered his mistake, notified to the Sheriff that the wrong person was in custody; and the Court discharged T. W., who then brought an action against the Sheriff for false imprisonment, and judgment having gone by default, damages were assessed, and paid by the Sheriff. The Sheriff then brought an action against the defendant, alleging a false and wilful representation by the foreman of the defendant, whereby he was induced to detain T. W. in custody. *Held*, there was no evidence to connect the defendant with the representation of his foreman, and that such representation was not false or wilful, inasmuch as it was made in answer to the Sheriff's inquiries, and when made, was believed to be true. *Q. B. Kinahan v. Malyn* 565

## SHIPS AND SHIPPING.

See SALVAGE.

## SHOWING CAUSE.

See AFFIDAVIT.

## SPECIAL JURY.

See JURY.

1. An issue directed by the Incumbered Estates Court was, by the order, to be tried by a special jury; and the plaintiff having, in pursuance of 8 and 9 Vic., c. 109, obtained a writ of summons, and framed the issue accordingly, obtained in this Court an order for the special jury in the usual way. At the trial, the Judge, not

being asked for that purpose, did not give a certificate that it was a fit case for a special jury; but some time after, on the request of plaintiff's Counsel, the Judge gave a certificate to that effect, which did not appear on the back of the record. *Held*, that the Taxing-officer was right in allowing the costs of the special jury to the plaintiff. *Q. B. Bodkin v. Leahy* 36

2. The Court will grant an absolute order in the first instance for a special jury under the old practice, provided sufficient ground be laid for the application. *Q. B. Fleming v. Taylor* 75
3. An indictment for libel having been found by the Term grand jury in the Court of Queen's Bench, the traverser pleaded in abatement, that two of the grand jurors were, at the time of their being summoned and serving on the jury, beyond the age of sixty years, and that another juror was not resident in the county of the city of Dublin. *Held*, that the Jury Act, 3 & 4 W. 4, c. 91, does not apply to Term grand juries in the Queen's Bench, and that therefore such pleas were bad. *Q. B. Regina v. Duffy* 88
4. *Held also*, that the objection as to age was ground of exemption, not of disqualification. *Ibid*
5. In an action on a policy of insurance, commenced before the 16 & 17 Vic., c. 113 (The Common Law Procedure Act), the venue being laid in a county of a city, the Court permitted a special jury to be struck, according to the practice existing before that Act, on an affidavit showing that the plaintiff was possessed of considerable influence in the place where the venue was laid, and that several of his relatives would be on the panel. *C. P. Barron v. West of England Insurance Co.* 112
6. The order for a special jury under the old system may be made *ex parte*. *Q. B. Dickson v. Denroche* 241
7. In an action commenced before the 1st of January 1854, the defendant

had obtained an order for a special jury, which was struck accordingly. The plaintiff afterwards entered a rule to discontinue.—*Held*, that the defendant was entitled, as against the plaintiff, to the costs of the special jury. *C. P. Johnson v. M. G. W. Railway Co.* 251

8. Where, in an action commenced after the 1st of January 1854, the plaintiffs applied for liberty to strike a special jury under the former practice (3 & 4 *W.* 4, c. 91), on the ground that it was desirable to have jurors of experience in a particular trade, and also that the plaintiffs, being Englishmen, were unknown to any of the jurors usually returned on the special jury panel of the county of the city of Dublin, the defendant being a citizen of Dublin: the Court refused the application with costs. *C. P. Harrison v. Lynch* 256

#### STATUTES CITED AND COMMENTED ON.

13 <i>Edw.</i> 1, c. 38. Juries	89
21 <i>Edw.</i> 1, c. 1. do	89
10 <i>Car.</i> 1, sess. 2, c. 18. Coroner	26
10 <i>W.</i> 3, c. 6. Ecclesiastical Law	268
9 <i>Anne</i> , c. 8. Landlord and Tenant—Rent	547
4 <i>G.</i> 1, c. 5. Ejectment—Rent	69
12 <i>G.</i> 1, c. 10. Ecclesiastical Law	268
11 & 12 <i>G.</i> 3, c. 17. do	268
28 <i>G.</i> 3, c. 31. Bill of Exceptions	309
31 <i>G.</i> 3, c. 18. Jurisdiction of Justice of the Peace	513
13 & 14 <i>G.</i> 3. Admission of Attorney	518
35 <i>G.</i> 3, c. 30. Debtor and Creditor—Arrest	2
37 <i>G.</i> 3, c. 54. Bank of Ireland	300
1 <i>G.</i> 4, c. 68. Recognizance in Error	467
7 <i>G.</i> 4, c. 74. Prisons Act	102
9 <i>G.</i> 4, c. 54. Coroner	26
3 & 4 <i>W.</i> 4, c. 27. Limitations	69
3 & 4 <i>W.</i> 4, c. 91. Special Jury costs	36
4 & 5 <i>W.</i> 4, c. 92. Fines and Recoveries	617
1 & 2 <i>Vic.</i> , c. 56. Poor-law	15, 147
3 & 4 <i>Vic.</i> , c. 105. Mesne Process—Judgment	449

3 & 4 <i>Vic.</i> , c. 107. Insolvent Act	102
3 & 4 <i>Vic.</i> , c. 108. Corporation Act	164
5 & 6 <i>Vic.</i> , c. 89. Drainage of Lands	140, 391
5 & 6 <i>Vic.</i> , c. 95. Prisons Act	102
6 & 7 <i>Vic.</i> , c. 92. Poor-law	15, 666
7 <i>Vic.</i> , c. 4. Funds—Stock	317
7 <i>Vic.</i> , c. 5. do.	317
8 & 9 <i>Vic.</i> , c. 16. Companies' Clauses Act	612
8 & 9 <i>Vic.</i> , c. 69. Drainage	391
8 & 9 <i>Vic.</i> , c. 109. Jury	36
9 <i>Vic.</i> , c. 4. Drainage of Lands	391
9 & 10 <i>Vic.</i> , c. 99. Salvage	95
10 & 11 <i>Vic.</i> , c. 79. Drainage	391
11 & 12 <i>Vic.</i> , c. 28. Small Debts—Arrest	34
12 & 13 <i>Vic.</i> , c. 55. Prisons Act	103
12 & 13 <i>Vic.</i> , c. 77. Incumbered Estates	449, 557
12 & 13 <i>Vic.</i> , c. 85. Burgess—Franchise	162
12 & 13 <i>Vic.</i> , c. 91. do. do.	163
13 <i>Vic.</i> , c. 18. Process and Practice Act	21
13 & 14 <i>Vic.</i> , c. 69. Registry of Voters	186
14 <i>Vic.</i> , c. 192. Receiving Stolen Goods	504
14 & 15 <i>Vic.</i> , c. 93. Petty Sessions	117, 586
14 & 15 <i>Vic.</i> , c. 99. Evidence Act	84
14 & 15 <i>Vic.</i> , c. 57. Costs of Action	502
14 & 15 <i>Vic.</i> , c. 100. Criminal Law—Perjury	512
16 & 17 <i>Vic.</i> , c. 113. Common Law Procedure Act	114

#### STAYING PROCEEDINGS.

See SECURITY FOR COSTS.

SETTING ASIDE PROCEEDINGS.

#### STOCK.

- 1 "I hold that mere negligence on the stock-owner's part, and especially negligence entirely unconnected with the making of the transfer in question, cannot absolve the Bank from responsibility, if they permit his stock to be transferred without his authority."—*Per JACKSON, J. Ex. Ch. Bank of Ireland v. Trustees of Evans' Charities* 303

2. "Under all the circumstances, it appears to me, that to establish a case of negligence in the trustees, which should disentitle them to recover in this action, something done or omitted by them, in reference to the very act of forgery itself, should have been shown; they should have been proved to have been directly concerned, to some extent at least, in the framing of the forged instrument."—*Per BALL, J. Ex. Ch. Bank of Ireland v. Trustees of Evans' Charities* 316
3. "It was, I think, a mistake to apply to such a case as this the principle of negligence. It is a strong thing to divest his property from a stock-owner, on the ground that he has been negligent about it. There must, I apprehend, be some positive act on his part to warrant an appropriation of it to another. The negligence, upon the authorities, must not only be gross negligence, *crassa negligentia*, but negligence in the transaction itself. It should furnish not merely an occasion, but directly lead to the loss."—*Per CRAMPTON, J. Id.* 336-7
4. "Where an Act of Parliament, or the Common Law, gives a party a title, he cannot lose that title by negligence, unless the negligence be such as shows he assented to the transfer, or assented to the loss of the property. The issue must be on the transfer of title, not on the mere negligence; but even though it were an issue competent to try the merits, there is no evidence to sustain such an issue, even as a case of negligence. The case of *Davis v. Bank of England* went upon this, that the title to the stock was not transferred by the forged power of attorney, or by personation, as in *Coles v. The Bank of England*. If the Bank seek to resist their liability, on the ground of the power of attorney being forged, they must show something that induced them to believe that the owner was the person who executed that power of attorney—that, by his previous conduct, or by his subsequent

or coteremporaneous assent, there was evidence to induce them to believe that it was his power of attorney; for he could not prosecute for the forgery, if he warranted by his conduct a person putting his name to the power: therefore, all evidence to show that he assented to it, or led to it, all that would be evidence relevant to the issue, whether he could say that the power was a forgery or not. So also, when there is personation, all evidence to show the personation was connived at, evidence to show he authorised it—that would be evidence relevant to the issue, whether the party did execute the power, or authorise the execution or personation of it. In all these cases, a public company were held answerable, unless they could show the owner of the property had induced or led to the forgery. The results of allowing this issue would be, that you would saddle the trustees with a suit in a Court of Equity for the recovery of this stock; for, if the negligence be such as is insisted, the trustees must be held liable for a breach of trust, and you would, therefore, have an issue knit involving them in a responsibility of this sort. This is an action for a breach of duty in not transferring this stock, and the evidence is applicable to a party being exempted from making the transfer; but it is enough to say there was no evidence to make the trustees liable for this loss. General negligence is no evidence whatever, for a party is not to be presumed to intend the commission of a felony."—*Per LEFROY, C.J. Id.* 380

#### SUBSTITUTION OF SERVICE.

*See* SERVICE OF PROCESS.

#### SUGGESTION.

1. Where the conusor of a judgment dies, notice of motion to enter a suggestion, for the purpose of issuing execution against his personal repre-

## SUGGESTION.

- Sentative, must be given. Q. B. *Neile v. Smith* 76
2. On an application for liberty to enter a suggestion upon the record of a judgment, a conditional order only will be granted in the first instance. Q. B. *Edie v. Phillips* 77
  3. Where two of three of the assignees of a judgment had disclaimed, the Court granted a conditional rule for liberty to the remaining assignee to enter a suggestion on the record, to enable the plaintiff to issue execution on this judgment. Q. B. *Disney v. Hamilton* 77
  4. The Court will not, at the instance of the executor of the conusee of a judgment, permit a suggestion to be entered for the purpose of reviving it, pursuant to the 16 & 17 Vic., c. 113 (Common Law Procedure Act), except in a plain case. Therefore where the affidavit of the party seeking the order disclosed a number of special circumstances, from which the existence of the judgment was sought to be deduced, the Court refused to permit a suggestion to be entered, the proper course being to sue out a writ of revivor. C. P. *Colhoun v. Semple* 114
  5. "The suggestion contemplated, according to the words of the 149th section, is a suggestion 'to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment for the said sum.' The affidavit here states a number of facts which might be disputed on the opposite side; so that this case can hardly come under the words 'manifestly appears.'" *Per BALL, J.* *Ibid*
  6. "We cannot make this order. It was stated here lately that the Court of Exchequer had decided that where there was a devolution of interest, they would not make such an order, which would have the effect of depriving the opposite party of the power of pleading. This is not a case in which it 'manifestly appears to the

## SUMMONS, &c. 703:

- Court' that the party is entitled to execution. The proper course will be to sue out a writ of revivor. *Id.* 115
7. Where it becomes necessary to move to revive a judgment within six years, by reason of a change of parties, &c., an absolute order may be granted in the first instance; *secus* when after six years. Cham. *O'Brien v. Dowell* 119

## SUGGESTION OF BREACHES.

A bond conditioned for payment of £200, subject to a proviso that if the obligor or his heirs, &c., should pay to the obligee £100 at the times mentioned in a defeazance, in a warrant of attorney, thereto annexed, without delay, the obligation to be void, otherwise to remain in force. The times and manner of payment specified in the defeazance were that the £100 should be paid by instalments of £10 on the 29th December following the date of the bond, and £10 on the 29th of every succeeding four months, and if default were made, the obligee was to proceed for whatever sum remained due. *Held*, that execution could not issue on such bond without a suggestion of breaches. Q. B. *Harrington v. Coze* 87.

## SUMMONS AND PLAINT.

### See EJECTMENT.

### PLEADING.

### SERVICE OF PROCESS.

### SETTING ASIDE PROCEEDINGS.

1. The name of the next friend of an infant plaintiff need not be stated in the writ of summons and plaint before service. It is sufficient if it be inserted before the filing of the writ. C. P. *Grady v. Hunt* 522
2. The Court will not set aside a writ of summons and plaint, if signed by Counsel, on the ground that it contains several counts varying the cause of action, where the plaintiff does not appear to have unnecessarily restated his complaint, with a view to oppress or embarrass the defendant. C. P. *Harrison v. Lynch* 527

3. "This motion must be refused. We are of opinion that the true construction of the Act is, that the party should state succinctly and clearly his cause of action; but the law in England, which obliges a party to have but one count for the same cause of action, has not ever extended to Ireland, and for very good reasons. We do not say that, if the party appeared to have oppressively stated and re-stated his cause of action, we might not be prepared to set aside or correct his pleading. But that does not appear to be the case in the present instance; and certainly where, in an action on a contract, a difficulty exists as to the construction of a document which is material to the case, a party must be at liberty to vary his pleading for his own safety. If the construction of a contract be doubtful, it is only right that the pleader should exercise his discretion, and put it in both ways, in order that he may not be turned round, by the Court taking one view while he takes another. We also think that where Counsel's signature is to a pleading, that is equivalent to a certificate by him that it is a proper pleading. Some credit must be given to Counsel's signature, and unless it appears clear that he has abused that privilege, the Court will not interfere in this way." *Per* MONAHAN, C.J. C.P. *Harrison v. Lynch* 530

## TAXATION.

*See* COSTS.

## TAXES.

*See* REGISTRY APPEALS.

## TENANT.

*See* LANDLORD AND TENANT.

## TIME, COMPUTATION OF.

*See* SETTING ASIDE PROCEEDINGS.

## TROVER.

*See* INDEMNITY.

1. The plaintiff, as assignee of a bankrupt, consigned goods to the defend-

## VARIANCE.

ants, a Railway Company, to be forwarded to D., which the agent of the Company undertook to do on the following day; but in the meantime, being apprised of an adverse claim to the goods by a third party, refused to do so, unless the plaintiff would furnish them with an indemnity. The plaintiff, having agreed to this, furnished the defendants with a letter, by which he agreed to indemnify them from the consequences of forwarding the goods to D., and that they should be at liberty to detain the goods until satisfied of the plaintiff's title. *Held*, in an action of trover, brought against the defendants to recover the goods, that the second agreement was binding on the plaintiff, it being competent for the parties, before the breach of the first, without any new consideration, to have substituted another, and that the plaintiff was therefore bound to prove that he had, before bringing the action, satisfied the defendants as to his title to the goods. C.P. *Scott v. Midland Railway Company* 59

2. *Held also*, the agreement to abandon the former contract, and to carry the goods, was sufficient consideration for the contract. *Id.*, *post*, 573

## TRUSTEE.

*See* LANDLORD AND TENANT.

## REVIVOR.

## WILL.

Where a judgment had been paid by the representative of the conusor, to three out of four trustees in whom it was vested, the fourth being resident out of the country, the Court refused to permit satisfaction of the judgment to be entered under the 143rd section of the 16 & 17 *Vic.*, c. 113 (Common Law Procedure Act). C.P. *Kelly v. Blake* 110

## USE AND OCCUPATION.

*See* PLEADING.

## VARIANCE.

*See* PLEADING.

## VENUE.

### VENUE.

*See* JURY.

1. Where a plaintiff seeks to change his own venue on special grounds, the defendant is entitled to the costs of the motion. *Q. B. Hewitt v. Hewitt* 222
2. An affidavit made in another cause, in which the plaintiff in the present cause was also plaintiff—*Held*, inadmissible to ground a motion to change the venue in the second cause. The existence of political feeling or prejudice is no reason for a change of venue. *Q. B. Dowling v. Sadlier* 603

### VOTE.

*See* POOR-LAWS.

REGISTRY APPEALS.

### WAIVER.

*See* IRREGULARITY.

SECURITY FOR COSTS.

SETTING ASIDE PROCEEDINGS.

### WARRANT OF ATTORNEY.

*See* JUDGMENT.

### WARRANTY.

*See* POLICY OF INSURANCE.

### WILL.

A testator, by his will, reciting that he was seised of a freehold estate in certain premises, devised as follows:—  
“I leave, devise and bequeath to my said daughter Margaret Healy all my freehold interest in North King-street, in the city of Dublin, upon trust to receive the rents and profits thereof, for and during the term of her natural

## WRIT OF ERROR. 705

life, for her own sole use, &c., notwithstanding her coverture, without the control of her present or any future husband, &c., with power to my said daughter, by any deed or will, to dispose of, devise or bequeath the said freehold estate to and among her children, in such shares and proportions as she shall think fit and proper.” After some bequests, a residuary clause followed, in these words:—“I do hereby give, leave and bequeath to my said daughter Margaret Healy all the rest, residue and remainder of my worldly substance, of what nature or kind soever, for her own sole use and benefit, without the control,” &c.—*Held*, that M. Healy took the absolute interest in the freehold estate; that the power was a naked one, not coupled with a trust, and that no estate was given to the children by implication from the words of the power. *E. Healy v. Donnery* 213

### WITNESS.

*See* COSTS.

JURISDICTION.

An attachment will not be granted against a witness for non-attendance at a trial, pursuant to a subpoena, unless he be called in Court by the crier, and a note taken of his non-attendance by the Judge's Registrar. *Q. B. O'Donnell v. O'Donnell* 29

### WRIT.

*See* REVIVOR.

SHERIFF.

### WRIT OF ERROR.

*See* ERROR.











